OFFICIAL EDITION

REPORTS OF CASES

HEARD AND DETERMINED IN THE

APPELLATE DIVISION

OF THE

SUPREME COURT

OF THE

STATE OF NEW YORK.

MARCUS T. HUN, REPORTER.

VOLUME XC.

1904.

J. B. LYON COMPANY,
ALBANY, N. Y.

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PRINTERS, ELECTROTYPERS AND BINDERS,
LYON BLOCK, ALBANY, N. Y.

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OF

THE APPELLATE DIVISION OF THE SUPREME COURT.

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* Designated by the Governor to act as Presiding Justice in the place of Mr. Justice GOODRICH, whose term expired December 31, 1903.

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The attention of the profession is called to the fact that the Court of Appeals in many cases decides an appeal upon other grounds than those stated in the opinion of the court below.

The affirmance or reversal of the judgment of the Appellate Division does not necessarily show that the Court of Appeals concurred in, or dissented from, the statements contained in the opinion of the Supreme Court. (*Rogers* v. *Decker*, 131 N. Y. 490.) — REP.

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DETERMINED IN THE

FIRST DEPARTMENT

IN THE

APPELLATE DIVISION,

January, 1904.*

EVA A. THOMAS, Appellant, *v.* HENRY A. DAVIS, Respondent, Impleaded with Others.

Mortgage with receivership clause — under what circumstances the court will appoint a receiver.

When a mortgage in process of foreclosure contains a receivership clause and it appears that it is a second mortgage; that the parties in possession are receiving the rents but refuse to pay the interest and taxes, and there is doubt whether the security is adequate, a receiver will be appointed.

APPEAL by the plaintiff, Eva A. Thomas, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 17th day of November, 1903, denying the plaintiff's motion for the appointment of a receiver pending the above-entitled action brought to foreclose a mortgage.

Charles L. Hoffman, for the appellant.

Henry A. Davis, for the respondent.

MCLAUGHLIN, J.:

This action is brought to foreclose a second mortgage upon certain real estate in the city of New York. After its commencement the plaintiff moved for the appointment *pendente lite* of a receiver

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* The other cases of this term will be found in volume 89 App. Div.—[REP.

of the rents, issues and profits of the real estate covered by the mortgage. The motion was denied and she has appealed.

From the papers used upon the motion it appears that in December, 1902, one Andrew J. Thomas owned the real estate in question, which he conveyed to Baldwin & Betts subject to two mortgages, one for $85,000 held by the Metropolitan Life Insurance Company, and the other for $45,000 held by the plaintiff. The plaintiff's mortgage bore interest at the rate of six per cent, payable semi-annually, and contained a provision to the effect that if default were made for a period of ten days in the payment of interest, and for a period of twenty days in the payment of taxes and assessments, the whole of said principal sum of $45,000 should become due at the option of the mortgagee. It also contained a further provision that the mortgagee or her representatives or assigns were at liberty immediately after any default in payment of interest or taxes, upon proceedings taken for the foreclosure of the mortgage, to apply for and be entitled, as a matter of right, without regard to the value of the premises mortgaged, or the solvency or insolvency of the mortgagor or any owner of the premises, upon five days' notice, to the appointment of a receiver of the rents, issues and profits of the premises covered by the mortgage. Baldwin & Betts defaulted in the payment of interest, and thereupon the plaintiff, exercising her option, elected to treat the whole sum as due and brought an action to foreclose, which was subsequently discontinued, they having conveyed the property for the consideration of $1,000 to the respondent above named, Henry A. Davis, who on the same day gave a third mortgage for $1,000 to one Pinkney, who resides at Harrisburg, in the State of Pennsylvania. After the discontinuance of the prior action this action was commenced, the complaint setting forth the default in payment of interest and taxes for the year 1903, and by reason thereof plaintiff's election to treat the whole sum as due. Upon the summons and complaint, affidavits showing the default and extent of the same, together with the value of the property and the pecuniary irresponsibility of the maker of the bond, plaintiff moved for the appointment of a receiver, which motion, as above indicated, was denied.

I am of the opinion that the motion should have been granted.

The mortgage sought to be foreclosed is a second mortgage and it may well be questioned, under the facts set out in the papers used upon the motion, whether the property is of sufficient value to enable the plaintiff to satisfy her mortgage on a sale, or realize anything upon the bond. The mortgage contains a provision to the effect that in case default be made in the payment of interest or taxes a receiver may be appointed. This provision of course does not control the court as to what should be done, but it is a proper subject to take into consideration. (*Eidlitz* v. *Lancaster*, 40 App. Div. 446; *Fletcher* v. *Krupp*, 35 id. 586.)

The general rule, as I understand it, is, when a mortgage contains such a provision and it further appears, as here, that the mortgage sought to be foreclosed is a second mortgage, that the parties in possession refuse to pay the interest and taxes, are receiving the rents, and that there is doubt as to whether the security is adequate, that a receiver will be appointed.

Here the fact is not disputed that all Davis paid for the property was $1,000, and that on the day he took title he mortgaged it for $1,000 to a non-resident; that the rents amount to nearly $1,000 a month, which he is receiving; and that he has neglected and refused to pay the taxes or interest which fell due several months ago. These facts brought the case within the general rule entitling a party to the appointment of a receiver.

The order appealed from, therefore, must be reversed with ten dollars costs and disbursements, and the motion granted, with ten dollars costs.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and HATCH, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

EXCELSIOR TERRA COTTA COMPANY, Respondent, v. DUDLEY S. HARDE and HERBERT S. HARDE, Appellants.

Foreclosure of a mechanic's lien — a demand exceeding by thirty-nine per cent the amount due under a contract — it is insufficient to set interest running on an unliquidated claim — no recovery is proper under an allegation of performance and proof that thirty-nine per cent of the work has not been done — necessity of an architect's certificate.

The complaint in an action brought to foreclose a mechanic's lien for work done under a building contract, alleged full performance by the plaintiff of the terms and conditions of the contract and of certain additions thereto and sought to recover the full contract price of the work, $6,755, together with the further sum of $1,100 for extra work.

The defendant denied the allegations of the complaint except as to the making of the contract and interposed a counterclaim for damages alleged to have been sustained by reason of the plaintiff's failure to perform the contract.

The trial court disallowed, upon the merits, the plaintiff's claim of $1,100 for extra work, and, in addition thereto, found that the defendant was entitled to offset against the plaintiff's claim the sum of $2,000 because of the defective way in which the plaintiff performed the work and of his inexcusable delay in completing the same.

Judgment was entered in favor of the plaintiff for $4,755, together with interest. The defendant only appealed from so much of the judgment as allowed interest.

Held, that as the contract did not, in express terms, provide for interest, a demand was necessary to set interest running, and that, as the demand which the plaintiff had made prior to the commencement of the action exceeded the amount due to him by $3,100, he was not entitled to interest.

Semble, that the plaintiff was not entitled to recover any amount whatever, because it appeared that he had failed to perform his contract to the extent of upwards of thirty nine per cent, and also because he did not produce the architect's certificate required by the contract, or establish that the architect wrongfully withheld such certificate.

APPEAL by the defendants, Dudley S. Harde and another, from so much of a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 11th day of December, 1902, upon the decision of the court, rendered after a trial at the New York Special Term, as awards the plaintiff interest upon the amount of its recovery.

Nathan Ottinger, for the appellants.

Charles Coleman Miller, for the respondent.

McLAUGHLIN, J.:

This action was brought to foreclose a mechanic's lien for work performed and materials furnished in erecting for defendants a building in the city of New York.

The complaint alleged that the parties entered into a contract by which the plaintiff agreed to do certain work and furnish certain materials for the erection of a building for the defendants in the city of New York, and for which it was to receive the sum of $6,600; that the plaintiff duly performed all the terms and conditions of the contract upon its part, together with certain additions thereto authorized in writing, by which it was entitled to receive the further sum of $155, and also that it performed extra work and furnished extra materials not specified in the contract or authorized in writing, by which it became entitled to receive the further sum of $1,100, making a total of $7,855 for which judgment was demanded. The answer admitted the making of the contract; denied the other material allegations of the complaint, and specifically denied the claim for $1,100 for extra work. It further set up a counterclaim amounting to $20,200, for damages alleged to have been sustained by reason of plaintiff's failure to perform the contract in furnishing the materials required and completing the work within the time specified. The plaintiff had a recovery for $4,755, together with interest thereon from September 5, 1901, to December 10, 1902, and a foreclosure was directed to satisfy this amount. Judgment was entered to this effect and defendants have appealed from so much thereof as allows interest on the amount recovered.

I think the judgment should be modified in so far as the defendants have appealed from it. The plaintiff sought to recover $7,855 and interest. It recovered only $4,755; in other words, the trial court held that the claim which it made against the defendants was invalid in upwards of thirty-nine per cent. The claim of $1,100 for extra work was disallowed upon the merits, and in addition thereto the court found that the defendants were entitled to offset against the plaintiff's claim the sum of $2,000 by reason of the defective way in which it performed the work specified in the contract and inexcusable delays in completing the same. The contract price, it will be remembered, was $6,600 and the plaintiff predicated its

right to recover upon full performance. The trial court found, and the evidence sustains the finding, that it did not fully perform; on the contrary, that nearly one-third of the value of the contract remained unperformed at the time the notice of lien was filed and the action commenced, and by reason thereof the defendants had been damaged to the extent of $2,000, which amount they could set off in reduction of plaintiff's claim. Upon this state of facts the plaintiff was not entitled to recover. (*Mitchell* v. *Williams*, 80 App. Div. 527.) In the case cited the contractor failed to perform one-seventh of the work specified in his contract. The trial court, after deducting such amount from the contract price by reason of defective materials furnished and delays in completing the work, gave judgment for the balance. On appeal the judgment was reversed, this court holding that, where there had been such a material part of the contract unperformed, a party could not recover upon an allegation of full performance. In the case now before us the trial court found that nearly one-third of the contract remained unperformed, and had it followed the rule laid down in the case cited the complaint would have been dismissed. This, however, was not done, and inasmuch as there has been no appeal from any portion of the judgment except that allowing interest, the same must be affirmed except so far as appealed from, and in that respect the judgment must be modified.

The plaintiff was not entitled to recover interest for another reason. The claim made by it was unliquidated and was subject to a reduction as the trial court found of $3,100. This being the situation, the case fell directly within the rule laid down in *Delafield* v. *Village of Westfield* (41 App. Div. 24; affd., 169 N. Y. 582). There action was brought to recover the contract price for labor performed and materials furnished, and the defendant claimed damages for breaches of the contract, which claim was allowed to the extent of $2,000. Here, as already said, the damages were unliquidated. The plaintiff had not performed its contract, and for which it was legally liable to respond in damages to the extent of $2,000, nor was it entitled to recover $1,100 claimed for the extra work. But it is said that the case of *Delafield* v. *Village of Westfield* (*supra*) has in effect been overruled by *Sweeny* v. *City of New York* (173 N. Y. 414.) We do not think it has. The *Sweeny* case

is clearly distinguishable from the *Delafield* case and the one now before us. In the *Sweeny* case the plaintiff entered into a contract with the city of New York for tearing down the walls and removing from the ruins of the Windsor Hotel the debris and recovering the dead bodies buried therein. The contract did not prescribe any gross sum to be paid for the work, but plaintiffs were to be allowed a specified price for each item of labor and materials furnished by them. After the completion of the work the plaintiffs presented a claim to the comptroller for something over $100,000. The claim was rejected and thereupon action was brought and a recovery had for over $79,000 upon which interest was allowed from the time stated. On appeal to this court the judgment was modified (69 App. Div. 80), but on appeal to the Court of Appeals the judgment of this court was reversed and that of the trial court affirmed, but in affirming the judgment the Court of Appeals reaffirmed the doctrine laid down in the *Delafield* case, Judge CULLEN delivering the opinion, saying: "In *Delafield* v. *Village of Westfield* (41 App. Div. 24; affirmed without opinion by this court, 169 N. Y. 582) the plaintiff's claim was on a *quantum meruit* for labor and materials furnished under a contract which had been broken by each party. The claim was subject to reduction for damage caused the defendant by the plaintiff's breach of contract and improper performance of his work. The defendant's set-off was unliquidated, and the plaintiff's recovery was necessarily dependent on the amount of that set-off. Interest was, therefore, allowed to neither party."

Here the plaintiff's claim was subject to reduction for damages caused by its breach of contract. The amount of the set-off was unliquidated and what the plaintiff was entitled to could not be ascertained until the amount of the set-off had been determined. Such amount was determined upon the trial to be $2,000, and in addition the claim made by the plaintiff was subject to a further reduction of $1,100 for extra work. It cannot be that one can be subjected to a liability for interest which depends upon a proper demand because he does not accede to an improper demand. The demand made by the plaintiff prior to the commencement of the action upon which the claim for interest has been allowed not only exceeded by $2,000, the amount due upon the contract, but it was

also coupled with an illegal demand for $1,100 for extra work which had never been dene, and for which, as already indicated, the court expressly found it was not entitled to recover anything. The contract did not in express terms provide for interest, and a demand was, therefore, necessary to set interest running, and it is well settled that when such demand is necessary, it must be for the amount due, and if it includes any item not recoverable, the demand is illegal and interest cannot be allowed. (*Cutter* v. *Mayor*, 92 N. Y. 166; *Deering* v. *City of New York*, 51 App. Div. 402; *Carpenter* v. *City of New York*, 44 id. 230.) Where one fails to perform his contract to the extent of upwards of thirty-nine per cent, and then seeks to maintain an action to recover the contract price, basing his right to recover upon full performance, a court of equity will not permit a recovery. (*Mitchell* v. *Williams*, 80 App. Div. 527; *D'Amato* v. *Gentile*, 54 id. 625; affd., 173 N. Y. 596; *Smith* v. *Ruggiero*, 52 App. Div. 382; affd., 173 N. Y. 614.) So here, had the defendant appealed from the whole judgment, it would, under the authorities cited, have to be reversed and the entire claim disallowed, but, as already said, defendants have only appealed from so much of the judgment as allows interest and to that extent it is erroneous.

The plaintiff was not entitled to recover for another reason, and that is because it did not produce the architect's certificate entitling it to payment. The contract provided that the payments were to be made upon the certificate of the architect. It is true the complaint alleges that the architect wrongfully withheld the certificate, but the findings made by the trial court show that this is not the fact. Plaintiff had not performed his part of the contract and, therefore, was not entitled to be paid. Under a clause in a contract of this character the obtaining of the certificate is indispensable to a recovery. (*Weeks* v. *O'Brien*, 141 N. Y. 199; *O'Brien* v. *Mayor*, 139 id. 543.) Discussion is unnecessary to demonstrate that the architect was not unreasonable in refusing a certificate where the court finds, after an investigation, that the plaintiff had not performed its contract, and by reason thereof defendants were entitled to an allowance by way of damages in nearly one-third of the entire contract price.

The judgment, so far as appealed from, therefore, must be

modified by striking out the allowance for interest and as thus modified affirmed, with costs to the appellants.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and HATCH, JJ., concurred.

Judgment modified by striking out allowance of interest and as so modified affirmed, with costs to appellants.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. J. METCALFE THOMAS, Appellant, v. THOMAS L. FEITNER and Others, as Commissioners of Taxes and Assessments of the City of New York, Respondents.

Assessment for personal tax — what affidavit as to residence elsewhere is sufficient to require the vacation of the assessment, in the absence of other proof — notice to the person assessed as to the insufficiency of the affidavit — when necessary.

A person who had been assessed for personal property as a resident of the city and county of New York for the year 1901, presented to the commissioners of taxes and assessments of the city of New York, on an application to vacate the assessment, the following affidavit:

"Deponent is not a resident of the County or City of New York, but resides at Southampton, Suffolk County, New York; that his actual residence is in Southampton aforesaid; that he has resided there more or less all his life; that some three years ago deponent left the State of New York and moved, with his family, to Colorado Springs, Colorado, and resided there for upwards of a year, and that thereafter, upon his return to the East, he moved to Southampton aforesaid. That while he resided in Colorado he continued to rent an office in the city of New York, wherein was office furniture of the value of seven hundred and fifty dollars ($750), and upon his application made in Colorado the assessment on his personal estate was reduced from ten thousand dollars ($10,000) to seven hundred and fifty dollars ($750). That deponent conducts business in Southampton, Suffolk County, New York, aud pays his assessment there and is also assessed and pays taxes upon his personal estate in Suffolk County."

The commissioners accepted the affidavit and informed the deponent's attorney that if further evidence was required he would be notified of that fact. Thereafter, and without giving the deponent's attorney such notice and without taking any further testimony upon the subject of deponent's residence, the commissioners refused to vacate the assessment on the ground that the proof presented by the deponent was insufficient to show that he had ceased to be a resident of the city of New York.

Held, that the facts stated in the affidavit, being unquestioned, established that the deponent's legal residence for the year 1901 was at Southampton and not in the city of New York;

That, in any event, the commissioners, having accepted the affidavit, could not entirely disregard it without notifying the deponent's attorney.

O'BRIEN, J., dissented.

APPEAL by the relator, J. Metcalfe Thomas, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 16th day of June, 1903, dismissing a writ of certiorari theretofore issued herein to review an assessment upon the personal property of the relator for the year 1901.

William H. Thitchener, for the appellant.

David Rumsey, for the respondents.

MCLAUGHLIN, J.:

The relator was assessed on his personal estate as a resident of the city and county of New York for the year 1901 in the sum of $20,000. He applied to the tax commissioners to vacate the assessment upon the ground that he was not a resident of the city and county of New York, but resided at Southampton, Suffolk county, N. Y., where he was assessed and paid taxes upon his personal estate. His application was denied upon the ground, as appears from the return made by the commissioners, that the proof presented by the relator to them was "insufficient to show that the relator had ceased to be a resident of the City of New York." The proof presented consisted of an affidavit in which the relator said: "Deponent is not a resident of the County or City of New York, but resides at Southampton, Suffolk County, New York; that his actual residence is in Southampton aforesaid; that he has resided there more or less all his life; that some three years ago deponent left the State of New York and moved, with his family, to Colorado Springs, Colorado, and resided there for upwards of a year, and that thereafter, upon his return to the East, he moved to Southampton aforesaid. That while he resided in Colorado he continued to rent an office in the city of New York, wherein was office furniture of the value of seven hundred and fifty dollars ($750), and upon his application made in Colorado the assessment on his personal estate was reduced from ten

thousand dollars ($10,000) to seven hundred and fifty dollars ($750). That deponent conducts business in Southampton, Suffolk County, New York, and pays his assessment there and is also assessed and pays taxes upon his personal estate in Suffolk County." This affidavit was accepted by the commissioners and no further testimony as to the relator's residence was taken, or, so far as appears, required, notwithstanding it appears from the affidavit of the attorney who presented it that he was informed by the commissioners if further evidence were required he would be notified of that fact, and which notice was not given.

The facts stated in the relator's affidavit as to his residence not being questioned, we think established his legal residence for the year 1901 at Southampton, Suffolk county, and not in the city of New York. (*People ex rel. Lord* v. *Feitner*, 78 App. Div. 287.) In any event the commissioners having accepted the affidavit, if they were not satisfied that the facts therein stated were true, they could not entirely disregard it in the absence of such notice. Section 8 of the Tax Law (Laws of 1896, chap. 908) provides, among other things, that "every person shall be taxed in the tax district where he resides when the assessment for taxation is made for all personal property owned by him." Here the relator is assessed upon his personal estate at Southampton and there pays his personal tax. The question presented is quite similar to the one presented in *People ex rel. Lord* v. *Feitner* (*supra*). In that case it appeared from an affidavit filed that the relator resided at Lawrence, in the county of Nassau; that she owned an apartment in the city of New York, which she occupied during a portion of the year, but did not consider such city her residence; she was assessed upon personal estate as a resident of the city of New York for the year 1901, and thereupon submitted an affidavit setting forth the fact that she did not reside in such city, but resided at Lawrence. The commissioners accepted the affidavit and required no further testimony, but notwithstanding that fact refused to cancel the assessment. This court held that the assessment should have been vacated, on the ground that the proof presented established the relator's residence at Lawrence, in the county of Nassau. Mr. Justice INGRAHAM, who delivered the opinion of the court, referring to the affidavit filed by the relator, said: "The commissioners accepted her statement and acted on it, and in

the absence of a request for further information, or for further evidence upon the subject, the statement thus accepted must be taken as true. Assuming that the relator did spend a portion of each year in the city of New York and a portion of each year at the house that she owned in Lawrence, Nassau county, the question as to which was her legal residence for the purpose of taxation was one of fact to be determined upon her intention as to which of these places should be her legal residence."

Nor is there any force in the contention of the respondent that the relator was not entitled to have the assessment vacated, inasmuch as the return denied, upon information and belief, an allegation in the petition to the effect that the relator at the time the assessment was made was not a resident of the city of New York. The proceeding is to review the action of the tax commissioners, and the return nowhere denies any of the facts set out in the petition as to what occurred before them. All of the allegations of the petition in this respect are admitted. The question, therefore, presented was one of law to be determined upon the petition and return thereto. Upon these facts the assessment should have been vacated, and for the reason that the relator during the period for which the assessment was made was not a resident of the city and county of New York, but was a resident of Southampton, Suffolk county, N. Y.

The order appealed from, therefore, must be reversed, with ten dollars costs and disbursements, and the motion to vacate assessment granted, with ten dollars costs.

VAN BRUNT, P. J., INGRAHAM and HATCH, JJ., concurred; O'BRIEN, J., dissented.

Order reversed, with ten dollars costs and disbursements, and motion to vacate assessment granted, with ten dollars costs.

In the Matter of the Application of the MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Relative to Acquiring Title, Wherever the Same Has Not Been Heretofore Acquired, to Whitlock Avenue (Although Not Yet Named by Proper Authority), from Hunt's Point Road to Westchester Avenue, as the Same Has Been Heretofore Laid Out and Designated as a First Class Street or Road in the Twenty-third Ward of the City of New York.

JOHN B. SIMPSON, JR., and WILLIAM SIMPSON, JR., as Executors, etc., of WILLIAM SIMPSON, Deceased, Appellants; THE CITY OF NEW YORK, Respondent.

Assessment for a street opening in New York city — the commissioners must state the value of each lot assessed.

Under section 980 of the Greater New York charter (Laws of 1897, chap. 378), which provides that in no case shall commissioners of estimate and assessment appointed in a street opening proceeding "assess any house, lot, improved or unimproved lands more than one-half the value of such house, lot, improved or unimproved land as valued by them," the report of such commissioners must show the value, as fixed by them, of the lots upon which an assessment for benefits is imposed.

A statement in the report that in no case does the assessment exceed "one-half the value of the lot assessed as valued by us," is insufficient.

VAN BRUNT, P. J., and HATCH, J., dissented.

APPEAL by John B. Simpson, Jr., and another, as executors, etc., of William Simpson, deceased, from so much of an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 10th day of February, 1902, confirming the report of commissioners of estimate and assessment in this proceeding, as confirms an assessment for benefits.

Barclay E. V. McCarty, for the appellants.

John P. Dunn, for the respondent.

MCLAUGHLIN, J.:

Proceedings were instituted under the statute for the opening of Whitlock avenue from Hunt's Point road to Westchester avenue in

the city of New York. In the supplemental report filed by the commissioners appointed therein certain property owners were assessed for benefits by reason of such opening, and they have appealed from so much of the order of the Special Term as confirmed the report of the commissioners as to such assessment.

In pursuance of a stipulation between the appellants and the respondent the only question to be determined upon the appeal is whether the report in so far as appealed from complies with that portion of section 980 of the Greater New York charter (Laws of 1897, chap. 378, as amd. by Laws of 1901, chap. 466), which provides that in no case shall the commissioners "assess any house, lot, improved or unimproved lands more than one-half the value of such house, lot, improved or unimproved land as valued by them." The supplemental report does not contain any statement as to the value of the lots determined by the commissioners, except that it does state that in no case does the assessment exceed "one-half the value of the lot assessed as valued by us." This statement does not meet the requirements of the statute. At most it is but the statement of a conclusion based upon facts as to which the report is silent. The commissioners have the power to impose an assessment upon a lot not exceeding one-half its value as fixed and determined by them. (*Matter of Mayor* (*Robbins Avenue*), 83 App. Div. 513; *Matter of Second Avenue M. E. Church*, 66 N. Y. 395.)

In *Matter of Mayor* (*Robbins Avenue*, *supra*) this court, in reversing a report of the commissioners in a similar proceeding, said: "The commissioners could not impose an assessment upon any of the lots until they had fixed and determined the value of such lots, and then such assessment could not exceed one-half of their valuation. In order to justify an assessment under this section, it is necessary that the report of the commissioners should show that the assessment is not more than one-half the value of the lot, and this cannot be done unless the report shows that the commissioners have determined the value of the lot assessed." The Court of Appeals, also, in construing a similar statute (*Matter of Second Avenue M. E. Church*, *supra*), said that an assessment might be imposed up to one-half the value placed upon the property, but to justify the assessment the city must show, when its act was questioned, that it had kept within that limit, and that it could not show without showing what was the

value fixed by the assessing officers. (See, also, *Matter of Cram*, 69 N. Y. 452.)

The commissioners, of course, could not impose an assessment in excess of one-half the value of the lot as determined by them, and whenever their act in making an assessment is brought under review, it can only be sustained by showing that they have complied with the statute, and such compliance cannot be shown unless there is some statement in their report from which the value as fixed by them can be ascertained; in other words, their report must show the value of the lots upon which an assessment for benefits is imposed. The clerical effort of inserting such value in a report imposes no hardship upon the city, is eminently fair to both it and the property owners, and, besides, enables the court to determine with at least some degree of accuracy whether the statute has been complied with, which cannot be done from a mere statement that the commissioners have complied with the statute in that they have not exceeded in their "assessment for benefit one-half the value of the lot assessed."

We are of the opinion that the order, in so far as appealed from, should be reversed, with ten dollars costs and disbursements, and the matter sent back to the commissioners for further consideration.

O'Brien and Ingraham, JJ., concurred; Van Brunt, P. J., and Hatch, J., dissented.

Ingraham, J. (concurring):

I concur with Mr. Justice McLaughlin, but I also think that it does not specifically appear by the report of the commissioners that they have valued each lot upon which they have imposed an assessment. They say: "We further report that in no case have we exceeded in our assessment for benefit one-half the value of the lot assessed as valued by us." There is no statement that they have fixed the value of the lots upon which the assessment has been imposed, and a compliance with this provision should not be left to inference. I do not understand that the commissioners are required to take evidence as to the value of the lots or parcels of land which are assessed for benefit. They are required to value each lot and are then authorized to impose an assessment for the proportion of the total expense of the improvement, not to exceed

one-half of the amount of such value; but before imposing any assessment they are required to value the lot upon which they intend to impose an assessment, and I agree that the amount that they fix as the value of each separate lot or parcel should appear in the report.

VAN BRUNT, P. J. (dissenting):

We dissent. We think that the commissioners have clearly complied with the law and that their report shows that they valued each lot assessed, and that such valuation was at least twice the amount assessed upon the lot by them. This clearly shows that they had valued each lot as required by law.

HATCH, J., concurred.

Order, so far as appealed from, reversed, with ten dollars costs and disbursements, and matter sent back to commissioners for further consideration.

E. MORGAN GRIFFIN, as Trustee for VIRGINIA W. BLANCHARD, Appellant, *v.* MARY B. TRAIN, Respondent.

Evidence — memorandum, when not against interest — when binding on the estate of the person making it — proof of personal transactions with a decedent by whom a memorandum, received in evidence, was made — what entries and memoranda made by a decedent are competent as evidence — evidence competent to explain them — presumption from the delivery of a check.

Frederick C. Train, who was trustee for Virginia W. Blanchard, drew his check to the order of his wife, Mary B. Train, for $2,500 against the funds of the trust estate. Mary B. Train indorsed the check in blank, and such check was thereafter indorsed by Frederick C. Train in his individual name and by him deposited in his personal bank account and collected. No part of such $2,500 was ever paid to the trust estate.

In an action brought after the death of Frederick C. Train by his successor in the trust against Mary B. Train to recover the $2,500 in question, it appeared that Train kept no regular books of account as trustee other than a check book, but was accustomed to keep among his papers memoranda containing a more or less full statement in respect to the property of the trust estate; that immediately after the death of Train there was found among the papers of the trust estate in his desk a memorandum in his own handwriting which

had the surnames of different people thereon, and opposite the name an amount of money and underneath a date; that in some instances merely initials were given; that one item in the statement was as follows:

"M. B. T.—

"June 15, 1898,..... ......$2,500.00."

The plaintiff, under objection and exception, was allowed to show that all the other items upon the said memoranda had been proven to be debts owing to said trust estate, and that all the other initials upon the said memoranda meant certain persons, who admitted that they owed the estate the amount set down in the memorandum opposite their respective initials.

The defendant, under objection and exception, was allowed to testify that she never had any of the money represented by the said check, and that she never at any time exercised dominion or ownership over the said check, and that she had no knowledge of the disposition of the said check or its proceeds, and that the defendant never received or borrowed any money from the said trust estate unless the indorsement of the said check constituted and imported in law a loan.

It was admitted by the plaintiff that the memorandum was made without the knowledge and not in the presence of the defendant.

Held, that as the memorandum tended to establish an indebtedness on the part of Mary B. Train to the trust estate and thus to relieve Frederick C. Train from liability to account for a portion of the trust fund, the memorandum constistituted a declaration made by Frederick C. Train in his own favor and interest and was not admissible as against Mary B. Train;

That the memorandum was, however, admissible against the personal representatives of Frederick C. Train and might form the basis upon which to found an obligation against his estate;

That the presumption arising from the delivery of a check by the trustee to the defendant Mary B. Train was that the check was given to her in payment of a debt.

Semble, that if the memoranda of the trustee were admissible in evidence, it would be competent for the defendant to meet the memorandum and explain the transaction.

Semble, that entries and memoranda made by deceased persons in the ordinary course of professional and official employment are competent as secondary evidence of the facts contained in them, where no interest exists to misrepresent or misstate the facts.

APPEAL by the plaintiff, E. Morgan Griffin, as trustee for Virginia W. Blanchard, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 4th day of April, 1903, upon the decision the court rendered after a trial at the New York Trial Term, a jury having been waived.

Louis F. Doyle, for the appellant.

Charles K. Carpenter, for the respondent.

HATCH, J.:

This action was brought to recover the sum of $2,500, which the complaint avers was loaned to the defendant by plaintiff's predecessor, as trustee. A jury trial was waived and the case was submitted to the court upon certain agreed statements of facts and offers of evidence by the respective parties, which offers were objected to by the opposing party. The facts agreed upon are as follows: On June 15, 1898, Frederick C. Train was the duly constituted and acting trustee under a deed of trust from Virginia W. Blanchard, and as such trustee was seized and possessed of a large amount of property belonging to the trust estate; that the defendant was the wife of Train; that on July 15, 1898, Train, as such trustee, drew his check upon the Mercantile National Bank of the city of New York to the order of the defendant Mary B. Train for $2,500 against the funds of the trust estate deposited in said bank; that the defendant thereupon indorsed the check in blank; that the same was afterwards indorsed by said Frederick C. Train in his individual name and was collected by him from the bank upon which it was drawn through a banking house where Train kept his personal account, and the proceeds were credited to such last-mentioned account; that Train died on March 8, 1902, at that time being trustee of said trust. Thereafter, and on March 25, 1902, the plaintiff E. Morgan Griffin was duly appointed trustee of said trust estate, including whatever claim said trust estate had against this defendant for the said $2,500; that Train, while trustee, kept no regular books of account as trustee, other than a check book, but that he was accustomed to keep among his papers memoranda, containing a more or less full statement in respect to the property of the trust estate; that no part of said $2,500 has ever been repaid to the trust estate.

The following evidence was offered by the plaintiff and received in evidence under objection by the defendant.

That immediately after the death of said Frederick C. Train there was found among the papers of the trust estate in his desk a memorandum in his own handwriting, which had the surnames of different people thereon, and opposite the name an amount of money

and underneath a date; that in some instances in that statement there were merely initials and no name at all; that one item in said statement was as follows:

"M. B. T.—
"June 15, 1898,.................. $2,500.00."

It was admitted by the plaintiff that said statement was made without the knowledge and not in the presence of the defendant. The admission of the above memorandum was objected to by the defendant upon the grounds that it was incompetent, immaterial and irrelevant, as hearsay and as a memorandum made by the deceased trustee in his own favor, without the knowledge and not in the presence of the defendant, and, as appears from the face thereof, not made in the regular course of business or at the time of the alleged transaction. This objection was overruled and the evidence received under exception. Another similar memorandum was found in the desk of said deceased among the papers belonging to the trust estate, upon which the same item appeared opposite the same date and under the initials "M. B. T." The same admissions were made by the plaintiff as to this entry; it was admitted in evidence under the same objection, and an exception was taken to such admission by the defendant. The plaintiff also offered to show that all the other items upon the said memoranda had been proven to be debts owing to said trust estate and that all the other initials upon the said memoranda meant certain persons, who admitted that they owed the estate the amount set down in the memorandum opposite their respective initials. This was objected to by the defendant upon the grounds that it was incompetent, immaterial and irrelevant, being offered in explanation of a memorandum not binding upon the defendant and not a part of the *res gestæ*. The objection was overruled and such evidence admitted, and exception taken thereto by the defendant. Then the defendant offered to show by herself, as a witness, an explanation of the whole transaction, that she never had any of the money represented by the said check and that she never at any time exercised dominion or ownership over the said check and that she had no knowledge of the disposition of the said check or its proceeds, and that the defendant never received or borrowed any money from the said trust estate, unless the indorse-

ment of the said check constituted and imported in law a loan. This was objected to by the plaintiff as being inadmissible under section 829 of the Code of Civil Procedure, which objection was overruled and the testimony received, to which the plaintiff excepted. The court below found that the transaction as above set forth did not constitute a loan from Frederick C. Train, as trustee of said trust estate, to the defendant, and that the defendant was not indebted to the said trust estate upon the said transaction in any sum whatsoever. From the judgment entered upon such decision the plaintiff appeals.

We are of opinion that the conclusion reached by the learned court below is clearly correct, although we are unable to concur in the reasoning adopted to reach such a result. The entries in the memoranda kept by the deceased trustee do not constitute the same declarations against his interest, so as to admit of their being received in evidence to establish the existence of a debt in favor of the trust estate against a third party. The existence of an indebtedness against a third party to the trust estate relieved the trustee from liability to that extent to the estate which he represented, as it accounted to the extent of the indebtedness for the funds of the trust estate which had come to his hands. Instead, therefore, of its constituting a declaration against interest, it is a declaration in his own favor and in his interest, and, as such, was not admissible for the purpose of establishing the existence of an indebtedness in favor of the trust estate against the defendant. The general rule is that entries and memoranda made by deceased persons in the ordinary course of professional and official employment are competent as secondary evidence of the facts contained in them, where no interest exists to misrepresent or misstate the fact. Such entries are admissible on the ground of necessity. (*Livingston* v. *Arnoux*, 56 N. Y. 507.) The deceased was not a public officer, nor were the entries made in the course of official business, which have been held to furnish a sufficient basis for the admission of entries as evidence to establish the performance of official acts. Between the deceased trustee and the defendant, if an obligation was created, it was that of debtor and creditor and stands upon no higher footing than such a relation between individuals establishes. The declaration of indebtedness, therefore, made by the trustee not only relieves

him and his estate to that extent from a devastavit of the trust estate to the amount of the indebtedness, but it is a declaration in his own favor of the existence of the debt. It is too well settled to need authority that a declaration in one's own favor is not admissible in evidence, nor are such declarations of deceased persons admissible unless against interest. (*Putnam* v. *Lincoln Safe Deposit Co.*, 87 App. Div. 13.) The following cases: *Chenango Bridge Co.* v. *Paige* (83 N. Y. 178); *Bump* v. *Pratt* (84 Hun, 201); *Matter of Woodward* (69 App. Div. 286); *Lyon* v. *Ricker* (141 N. Y. 225), recognize this rule and make application of it. In those cases the declarations which were received in evidence were all declarations against interest, and were, therefore, properly held admissible. Here it is a declaration in favor of interest, and this difference calls for the application of the reverse rule. The transaction, as it appeared, was of the delivery of a check by the trustee to the defendant, and the presumption under such circumstances arose that it was given in payment of a debt due to her. (*Nay* v. *Curley*, 113 N. Y. 575.) The force and effect which the court must attribute to this written memorandum, therefore, is not only to establish a debt to the relief of the trustee and his estate, but it must also have the added force of overcoming the presumption that the transaction was in payment of an existing indebtedness. The presumption that a check is given in payment for an existing obligation may, under a given state of circumstances, be slight, but standing by itself, such is the presumption created by the act, and if the declaration be held admissible, it relieves the trustee from the presumption that he paid a debt, and at the same time establishes the fact that out of the transaction an obligation in favor of the estate was created. A very strong case, therefore, of a declaration in favor of interest is made to appear, and no case of which we are aware has yet gone so far as to admit such declarations in evidence. Undoubtedly, this memorandum of the deceased trustee is admissible against the personal representative of the deceased and may form the basis upon which to found an obligation against his estate in favor of the present trustee (*Putnam* v. *Lincoln Safe Deposit Co.*, *supra*), but with that question we are not now concerned. This conclusion leads to the inevitable result that the testimony of the defendant was not admissible in evidence. Such was the view of

the learned judge below, and we entirely agree with him that if the declarations of the trustee were admissible in evidence, then it opened the door for the introduction of evidence by the defendant, who was authorized to meet the declaration and explain the transaction. (*Marsh* v. *Brown*, 18 Hun, 319; *Nay* v. *Curley*, *supra*.) The declaration of the trustee not being admissible, no basis existed upon which to found a liability against the defendant.

It follows, therefore, that the judgment should be affirmed, with costs.

VAN BRUNT, P. J., PATTERSON and INGRAHAM, JJ., concurred; LAUGHLIN, J., concurred in result.

Judgment affirmed, with costs.

ELLA M. BENNETT, Appellant, v. JACOB MAHLER and Others, Composing the Firm of MAHLER BROTHERS, Respondents.

Contract of employment for a year — action to recover damages for a breach thereof — proof proper to establish the contract in the absence of a plea of the Statute of Frauds — duty to plead the Statute of Frauds — what contract is not within the statute — a contract of employment continued by the continuance of the employment — amendment of a complaint induced by an erroneous ruling.

The complaint, in an action brought to recover damages for the alleged wrongful discharge of the plaintiff from the employ of the defendants, alleged that, on or about the 1st day of January, 1902, the parties entered into an agreement whereby the plaintiff agreed to work for the defendants during the calendar year 1902.

Upon the trial the plaintiff testified that she was first employed by the defendants in September, 1896; that upon the first day of January following her employment was continued upon the same terms for the ensuing calendar year, and that she continued thereafter to work from year to year under a renewal of the contract until about the middle of December, 1901; that at that time one of the defendants discharged her, but informed her that she could stay until January first; that she continued to work as before until December 30, 1901, when one of the defendants directed her to go to a given place and obtain some goods; that the plaintiff said, "Mr. Mahler, I am leaving here the 1st of January," and that Mahler replied, "That is off. You can go down town and get these goods and come back and take a few days vacation and then come back the next week for the ensuing year."

The plaintiff continued in the employ of the defendants until the second of January when another member of the firm said that he expected that she was

going to leave, to which she replied that she "was going to stay," and he said, "that is all right I am glad you are staying." On June 14, 1902, she was discharged.

After this testimony had been given without objection, the defendants moved to strike out the testimony as to the employment in December, 1901, upon the ground that it did not conform to the allegations of the complaint; that it tended to establish a contract void under the Statute of Frauds and that the form of the complaint was such that the defendants were not called upon to plead the Statute of Frauds as a defense. The court upheld the defendants' contention and struck out the testimony in question.

Held, that the ruling was erroneous:

That, in the absence of a plea of the Statute of Frauds, the plaintiff might prove, under the allegation of the complaint that the contract was entered into on or about the 1st day of January, 1902, that the contract was made December 30, 1901, for her employment during the ensuing year;

That if the defendants desired to interpose the defense of the Statute of Frauds, it was their duty to plead it;

That not having done so, the plaintiff could recover upon the contract, even though it fell within the Statute of Frauds;

That the contract as proved did not, however, fall within the Statute of Frauds, for the reason that the only contract which the plaintiff could enforce was the contract created by operation of law, resulting from the continuance of the employment under the yearly renewals;

That such contract was entered into on the first day of January, and hence was not within the statute;

That the conversation had on December 30, 1901, did not constitute a new contract, but simply served to indicate the defendants' desire that the relations theretofore existing between the plaintiff and the defendants should continue;

That the fact that, after the erroneous ruling of the trial court, and because thereof, the plaintiff was placed in a position in which she was obliged to amend her complaint by alleging that the contract was made on the 30th day of December, 1901, did not impair the plaintiff's rights, and that she should be allowed to again amend her complaint by restoring the original cause of action.

APPEAL by the plaintiff, Ella M. Bennett, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 30th day of April, 1903, upon the dismissal of the complaint by direction of the court after a trial at the New York Trial Term, and also from an order made on the 27th day of March, 1903, denying the plaintiff's motion for a new trial made upon the minutes.

Isaac Franklin Russell, for the appellant.

John Frankenheimer, for the respondents.

Hatch, J.:

This action is brought to recover damages for a claimed unwarranted discharge of the plaintiff from her employment by the defendants. It was averred in the complaint that the defendants are copartners, engaged in the dry goods business in the city of New York; that on or about the 1st day of January, 1902, at the defendants' place of business, the parties entered into an agreement wherein the plaintiff agreed to work for the defendants for and during the calendar year 1902, and in consideration of such services defendants agreed to pay therefor the sum of sixteen dollars per week and a certain percentage upon sales; that the plaintiff entered upon her employment under the agreement and continued in performance of the terms thereof upon her part until on or about the 14th day of June, 1902, when the defendants wrongfully discharged the plaintiff in violation of the terms of the agreement, and have since refused to allow her to perform her contract, which she was then and since has been ready and willing to perform. In answer to the complaint the defendants deny the contract averred therein, or that the plaintiff entered into any employment thereunder, or that she was wrongfully discharged, and further answering aver that while she was in the employ of the defendants she was discharged from such employ on June 14, 1902, for good and sufficient reasons stated therein. These were the issues framed when the parties came to trial. Plaintiff was called as a witness, and testified that she was first employed by the defendants about the middle of September, 1896; that upon the first day of January following her employment was continued upon the same terms for the ensuing calendar year, and that she continued thereafter to work from year to year under a renewal of the contract until about the middle of December, 1901, on which date differences arose between plaintiff and Jacob Mahler, one of the defendants, as a result of which he discharged her. The plaintiff refused to leave at that time and was then informed that she could stay until the first day of January. Thereafter she continued to work as before until the thirtieth day of December, when Jacob Mahler directed her to go a given place and obtain some goods. The following conversation then ensued; plaintiff said, "Mr. Mahler, I am leaving here the 1st of January." Mr. Mahler replied, "That is off.

You can go down town and get these goods and come back and take a few days vacation and then come back the next week for the ensuing year."

The plaintiff continued in the employ and nothing further transpired until the second week in January, when S. Mahler, another member of the firm, told her that he expected she was going to leave, and plaintiff said she "was going to stay," and he said, "That is all right. I am glad you are staying." After some further testimony had been given by the plaintiff, not germane to the present question, counsel for the defendants moved to strike out the testimony given by the plaintiff as to the employment in December, 1901, as being at variance with the complaint, claiming that the evidence tended to establish a contract void by the Statute of Frauds; that the defendants had been misled by the averment of the complaint, which alleged a cause of action not within the Statute of Frauds, and, therefore, the defendants were not called upon to plead the same. No objection had been interposed to the testimony which had been given by the plaintiff, and the first time any question was raised concerning it was when the motion to strike out was made. Then ensued between court and counsel a colloquy respecting the interposition of the plea, in which counsel for the plaintiff stated that he was surprised at the defense of the Statute of Frauds. While the court intimated that it would permit an amendment of the answer, averring as a defense to the contract sued upon the Statute of Frauds, yet no amendment was made at that time and plaintiff was permitted to continue the examination of the plaintiff in the then state of the pleadings. The evidence as developed from the subsequent examination was, in substance, as has been already given, and again ensued a discussion between the court and counsel as to the character of the pleadings and the effect of the testimony as establishing a contract which in fact fell within the Statute of Frauds. At the conclusion of the discussion the court granted the motion to strike out the testimony of the plaintiff in regard to the alleged contract of hiring, made on the 30th day of December, 1901, for the calendar year 1902, upon the ground that it did not conform to the allegations of the complaint. To this ruling plaintiff excepted.

The ruling was erroneous and the exception taken thereto must

be sustained. The complaint itself was perfectly good as a pleading, as it averred that a contract was entered into on or about the 1st day of January, 1902, for services to be rendered during the ensuing calendar year. Under this pleading the plaintiff might prove and recover thereon for a contract entered into on the 30th day of December, 1901, for employment during the ensuing year and recover thereon in the absence of a plea of the Statute of Frauds as a defense thereto. In *Fanger* v. *Caspary* (87 App. Div. 417) this court said: "Where the complaint avers a contract which may fall within the Statute of Frauds and the contract as proven does come within its terms, an objection to the proof is not available to defeat a recovery thereon in the absence of an affirmative plea" of the Statute of Frauds, and cited in support of such ruling *Honsinger* v. *Mulford* (90 Hun, 589; affd. on appeal, 157 N. Y. 674). These cases directly support such ruling and are precisely applicable to the case at bar. The complaint in the present case gave the defendants notice that the contract relied upon was made on or about the 1st day of January, 1902. Proof of the conversation was on the 30th day of December, 1901, and this time was within the averments of the complaint. Of such facts the defendants were bound to take notice, and if they desired to raise the Statute of Frauds as a defense to the contract, thus averred, they were required to plead it; consequently not pleading it, they were bound by such contract even though it fell within the statute. It follows as a necessary result that when the defendants made their application for leave to amend their pleading upon the ground that the contract proved was a variance from that which was averred, no basis existed therefor, and as it injected a new and distinct issue into the trial, it was not proper to allow it, and the plaintiff's claim of surprise was a sufficient answer thereto.

In addition to this it is clear that the contract, as proved, did not by its terms fall within the statute and it was, therefore, error for the court to strike out the testimony. The evidence disclosed that the first contract of employment was made in September, 1896; that a new contract for a year's service was made on the 1st day of January following and that such contract was thereafter continued by the continuance of service down to the 1st day of January, 1902. The continuance of service operated in law as a new hiring

for the period of a year, as the contract proved in its inception was a contract for a year's service and the continuance of service was a renewal of such contract for the same period of time. (*Douglas* v. *M. Ins. Co.*, 118 N. Y. 484; *Martin* v. *N. Y. Life Ins. Co.*, 148 id. 117.) The subsequent conversation had with one of the members of the firm with respect to her rendering services for another year was not the making of a new contract. Nothing whatever was then said as to the terms of her employment; what compensation she was to receive, or how it was to be paid; nor did the plaintiff from anything which appears assent to new arrangements made at that time. Her statement was that in view of the difference which had existed her term of service would end on the first day of January, and defendants' declaration in reply was "that is off" and that she could take a vacation of a few days and then come back. The effect of this transaction was to indicate upon the part of the defendants a desire that their present and future relations should not be interrupted, but there was no discussion of any terms of employment and no contract was then made. The terms of the employment were as if nothing had been said and the plaintiff had continued in her employment. The only contract which the plaintiff can enforce is the contract created by operation of law, resulting from the continuance of the employment. That did not commence until the former ended, and the old one ceased and the new began on the first day of January of the ensuing year; consequently the contract as proved upon the trial did not fall within the terms of the statute, and if the jury believed the testimony which had been given of the contract and that the defendants were guilty of a wrongful breach of it, plaintiff was entitled to recover, whether the Statute of Frauds was pleaded or not, so that in no view of the case can this ruling of the court be supported.

Nor can the defendants avoid this result by the amendment of the complaint setting out the contract as made on the thirtieth day of December. The plaintiff had given evidence which, if believed by the jury, established a perfect cause of action. The court by its ruling, to which an exception was duly taken, drove the plaintiff to take other steps to extricate herself from the difficulty which the court and defendants had created for her. Counsel did that which he was best advised to do at the time, even though it was the worst

thing for his client that he could do, and thereupon a condition was created which required the court, as matter of law, to dismiss the complaint; but this arose out of the fundamental error which had been previously committed, and the final disposition which was made of the case amounts for all practical purposes to a mistrial.

It follows from these views that the judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event, and with leave to plaintiff to apply to the court for the amendment of her pleading by restoring the original cause of action as averred in the complaint before amendment.

O'BRIEN, INGRAHAM and MCLAUGHLIN, JJ., concurred; VAN BRUNT, P. J., dissented.

Judgment and order reversed and new trial granted, with costs to appellant to abide event, with leave to the plaintiff to apply to the court for amendment of her pleading by restoring the original cause of action as averred in complaint before amendment.

JAMES HAGAN, Appellant, v. JACOB DRUCKER, Respondent.

Marketable title — a contract vendee is not entitled to demand a title absolutely free from all suspicion or possible defect.

A vendee of real property is not entitled to demand a title absolutely free from all suspicion or possible defect. He is simply entitled to receive a marketable title, namely, one which business men, in the exercise of that degree of prudence which usually characterizes their acts and controls their judgment, would be willing to and ought to accept.

Thomas Green, who died about 1834, left a will which referred to his wife, but made no mention of any children. As to certain property in the State of New York he died intestate, and in 1882 an action was brought to partition it.

The complaint in the action alleged that Green left him surviving as his only heirs at law four brothers and two sisters. Upon the trial, witnesses testified that the said Thomas Green left him surviving four brothers and two sisters, naming them. It was not stated by any of the witnesses whether or not Thomas Green left any widow, parent, child or children.

The referee, in his report, found that Green left him surviving as his only heirs at law four brothers and two sisters. No widow, parent, child or children of Green have ever appeared.

Held, that the failure of the witnesses sworn on the trial of the partition action to make it affirmatively appear that Green did not leave any widow, parent, child or children, did not render the title to the premises unmarketable in the hands of a mesne grantee from the purchaser at the partition sale.

Appeal by the plaintiff, James Hagan, from an interlocutory judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 8th day of July, 1903, upon the decision of the court, rendered after a trial at the New York Special Term, directing that the plaintiff specifically perform a certain contract for the purchase of real property.

A. Walker Otis, for the appellant.

Morris H. Hayman, for the respondent.

Hatch, J.:

On the 4th day of February, 1902, the plaintiff and defendant entered into a contract, in writing, whereby the defendant agreed to convey to the plaintiff on March 14, 1902, the premises known as 2220 Eighth avenue, in the borough of Manhattan, in the city of New York, for the sum of $23,500, payable as follows: $500 upon the execution of the contract, $14,500 by assuming a mortgage of that amount, and $8,500 in cash upon the delivery of the deed. The time for closing was thereafter extended to March 16, 1902. At the time fixed the defendant tendered the purchase price and the plaintiff tendered a deed, which the defendant refused to take, upon the ground that there was a defect in the plaintiff's title. The alleged defect was claimed to be in a deed, in plaintiff's chain of title, from William A. Boyd, a referee in partition, to William C. Lester, dated February 24, 1883. It was stipulated at the trial that the validity of the plaintiff's title depended upon the regularity of the proceedings in the action of partition, wherein this deed was given. That action was brought to partition the real estate of one Thomas Green, who died in about the year 1834, intestate as to the property in question. In that action there was the usual reference to ascertain to whom the title descended, and witnesses were produced who testified that the said Thomas Green left him surviving four brothers and two sisters, whom the witnesses named, and told when each one of them died, what heirs at law and next of kin

these brothers and sisters left them surviving, and who would inherit their share of the land in question. Is was not stated by any of the witnesses whether or not Thomas Green left any widow, parent, child or children, and for failure to make it affirmatively appear that he did not leave widow, parent, child or children, the defendant contends that the plaintiff's title is defective for that reason. It was averred in the complaint in the action of partition that Thomas Green left him surviving, as his only heirs at law, the said four brothers and two sisters, and the testimony given upon the trial was in support of this averment. The referee found the same to be true in his report, and that the said four brothers and two sisters were the only heirs at law that the said Thomas Green left him surviving. The trial court in the case at bar decided that the evidence in the action of partition before the referee warranted the finding which was made, and concluded therefrom, as well as from the other facts and circumstances, that there was not such a cloud upon plaintiff's title as to render it unmarketable, and that, therefore, the defendant could be compelled to perform specifically the terms of the contract of purchase. It is from the interlocutory judgment entered upon the decision that this appeal is taken.

There is much ground from which to infer that there were no other heirs at law survivors of Thomas Green, save those averred in the complaint and stated in the testimony of the witnesses. The language used by the witnesses is, "left him surviving," and then names the persons. It omits the words "his only heirs-at-law," which was a statement of the complaint in the partition action. In addition to this, it appears that Thomas Green left a will, but did not devise this property therein. It refers to his wife, but makes no mention of any children. If he had children they were clearly cut off by his will from any share in the property devised thereunder, and if he had children and intended to disinherit them, it is somewhat singular that he did not make mention of such fact, and still stronger would be the circumstance that no child or children appeared to contest the will. In *Greenblatt* v. *Hermann* (144 N. Y. 13) it appeared that a petition was presented for the sale of decedent's real estate for the payment of his debts, pursuant to the provisions of section 2752 of the Code of Civil Procedure, which provides that the petition in such case shall "set forth, * * * as

nearly as the petitioner can, upon diligent inquiry, ascertain * * * the names * * * of all the heirs and devisees of the decedent." The petition therein under consideration stated that the persons named therein were the decedent's "heirs at law." It did not state that they were "all the heirs." The court held the petition sufficient, based upon the fact that the section of the Code did not in terms require that the petition should aver that all the heirs are named, but only required that all the heirs should be named, and it was held that the language used was to be construed as stating that the persons named were all of the heirs. This decision, while not controlling of the present question, as it made construction of a Code provision not involved herein, is pertinent by way of illustration as showing how the courts have construed questions in many respects similar to the one presented by this appeal. Taking into consideration the averment of the complaint, the testimony and the fact that no widow, parent, child or children have appeared in anywise to raise any question respecting this title, and the result is a moral certainty that the persons named were all the heirs and next of kin of Thomas Green. In view of these circumstances and others which appear, we think the decision of the learned court below can safely be rested upon the ground that the liability to have the title questioned is a mere possibility, and is so remote that no real defect can be said to exist. The purchaser is entitled to receive a marketable title, but such fact does not entitle him to demand a title absolutely free from all suspicion or possible defect. The requirement is answered when a title is presented which business men, in the exercise of that degree of prudence which usually characterizes their acts and controls their judgment, would be willing to and ought to accept. (*Todd* v. *Union Dime Sav. Ins.*, 128 N. Y. 636.) Thomas Green died about 1834. His will was probated in Stamford, in the State of Connecticut, August 25, 1836. Both he and his descendants had attained to advanced age. The nephew of Thomas Green, who gave his testimony in 1882, was then seventy years of age. During a period of seventy years no one has appeared claiming any rights or interests in this property. Therefore, that any attack will be made upon this title by heirs at law of Thomas Green scarcely rises to a possibility; at least it is so remote as matter of fact as to be unworthy of consideration. Under

the Statutes of Limitation, taking into consideration the existence of infants and the time granted to an incompetent person to bring an action, there would seem to be no person in being who could successfully attack it. Under such circumstances a title will not be regarded as unmarketable. (*Hamershlag* v. *Duryea*, 58 App. Div. 288; affd. on appeal, 172 N. Y. 622.) In *Cambrelleng* v. *Purton* (125 N. Y. 610) it was said by Judge O'BRIEN, in writing for the court: "If the existence of the alleged fact which is claimed or supposed to constitute a defect in or cloud upon the title is a mere possibility, or the alleged outstanding right is but a very improbable or remote contingency, which, according to ordinary experience, has no probable basis, the court may, in the exercise of a sound discretion, compel the purchaser to complete his purchase." And such has been the uniform holding. (*Carroll* v. *McKaharay*, 35 App. Div. 582; *Faile* v. *Crawford*, 30 id. 536; *Matter of Trustees N. Y. P. E. Pub. School*, 31 N. Y. 574.) We conclude, therefore, that this title is marketable, and the interlocutory judgment should, therefore, be affirmed, with costs.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and LAUGHLIN, JJ., concurred.

Interlocutory judgment affirmed, with costs.

JULIA S. BOYD, Respondent, *v.* UNITED STATES MORTGAGE AND TRUST COMPANY and Others, Doing Business under the Name of GREENE & TAYLOR.

UNITED STATES MORTGAGE AND TRUST COMPANY, Appellant.

Security for costs — right thereto not waived by answering a complaint, where an amended complaint changing the capacity in which the defendant is sued is served.

The service by a non-resident plaintiff, who originally brought his action against the defendant "as substituted Trustee under the Will of Matthew Byrnes, deceased," of an amended summons and complaint, from which the words quoted were omitted wherever they appeared in the original complaint, so far changes the proceeding as to entitle the defendant to move for an order requiring the plaintiff to give security for costs, although such defendant has answered the original complaint without making any motion for security.

APPEAL by the defendant, the United States Mortgage and Trust Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 23d day of November, 1903, vacating an order requiring the plaintiff to give security for costs.

Theodore H. Lord, for the appellant.

Howard Taylor, for the respondent.

HATCH, J.:

This action was brought to recover damages alleged to have been sustained through the negligence of the defendant. The order for security for costs was granted on August 3, 1903, and was founded upon affidavits which showed that the plaintiff was a resident of the city of Philadelphia in the State of Pennsylvania. The affidavits stated, among other things, that the action was commenced by the service of a summons and complaint upon the defendant on the 15th day of July, 1903. The facts relative to the question involved are as follows: The plaintiff commenced an action against the defendant by service of a summons and complaint upon the defendant trust company, denominated therein "as substituted Trustee under the Will of Matthew Byrnes, deceased," it being alleged that the trust company, as such trustee, was the owner of the premises where the accident occurred. The company appeared and answered. In May, 1903, the plaintiff made a motion for leave to amend the summons and complaint by striking out the caption thereof, and wherever else it appeared, the words "as substituted Trustee under the Will of Matthew Byrnes, deceased," after the words "United States Mortgage and Trust Company." This motion was denied, but upon appeal to this court the order was reversed and the motion granted. (84 App. Div. 466.) By the order of reversal the plaintiff was directed, within ten days after the entry of the order, to serve upon the trust company a copy of the amended summons and complaint, and it was further ordered that the trust company should have twenty days after such service within which to answer the amended complaint. The plaintiff desired to have the order resettled in some manner and applied to the defendant's attorneys for an extension of time in which to serve the summons and complaint. The

defendant's attorneys, in writing, extended such time five days until July 15, 1903, designating themselves as "Attorneys for defendant Trust Co., as substituted trustee under the will of Matthew Byrnes, deceased." Upon a subsequent application for a further extension the defendant's attorneys refused the same, declaring that they had no right to represent the defendant trust company in any manner, except as substituted trustee, and suggested to plaintiff's attorneys that they serve the amended summons and complaint upon the defendant trust company. Service was thereupon made upon the trust company upon the 15th day of July, 1903. The summons and complaint were precisely like the former summons and complaint, except that the words were omitted as directed in the order made by the Appellate Division. The papers thus served were not designated as amended summons and complaint. No action was taken upon the motion to resettle until October, when it was denied. The amended summons and complaint were returned to the plaintiff's attorneys upon the ground that they were not served in time and that they were not in conformity with the provisions of the order of the Appellate Division, but the defect therein was not pointed out, and the defendant's attorneys stated orally that the objection that they were not served in time would be withdrawn, if the last served copies of the summons and complaint were designated as amended. This the plaintiff's attorneys refused to do, saying that the papers would speak for themselves. Thereafter the motion was made for security for costs, and the defendant's attorneys insisted that the commencement of the action should be considered as being at the time of the second service. The plaintiff contends that it should not be so construed as its effect would be to interpose as a bar the Statute of Limitations.

The motion which was made by the plaintiff was to amend the summons and complaint, and this was the order granted by this court wherein the summons and complaint were required to be served personally upon the trust company. Upon this appeal we are concerned only with the question as to whether the service of this amended summons and the amended pleading entitled the defendant therein to make an application for an order that the plaintiff file security for costs. The non-residence of the plaintiff entitled the defendant to such order unless in some form it had waived the right.

(Code Civ. Proc. § 3268.) The defendant when it moved for the order stated that the commencement of the action was of the date when the amended summons and complaint were served, and by stating in its affidavit that the action was commenced upon that date it has been deprived of its right to have security filed for costs. We think that its statement in this regard should not have defeated its right to the order. All of the facts were before the court and, without regard to what either party claimed, it clearly appeared that the application to compel the filing of security was based upon the amended summons and complaint, and the date of its service was not a matter of dispute. The whole subject-matter, however, has been made to turn upon the statement in the affidavit that the action was commenced on that date, and thereby the defendant has been deprived of a substantial right. What the legal effect is of the service of the amended summons and complaint upon the trust company is a matter which is not presently of consequence, and we are not called upon to determine it. This court has held that the amended papers might be served and the action continued as it existed before, and we do not now assume to depart from such holding. Nothing, however, was determined in the decision authorizing the amendment which excluded the defendant from making application for any order or other relief thereunder to which it might show itself entitled, and by the amendment which the plaintiff obtained, we think, she subjected herself to a motion to compel the filing of security for costs. The amendment carried with it the right to move for security and did not operate in destruction of it. It was so far a changed proceeding as to entitle the defendant to the order and it could not be defeated in such right upon the ground of waiver after the amended pleading was served. Nor does the fact that it procured an order to be entered declaring the action against the defendant as substituted trustee abandoned interfere with its right to procure the order to file security for costs. The fact that the last-named order contained a stay of proceedings did not destroy defendant's right to the security for which the order provided. Plaintiff would, undoubtedly, have the right to make application to the court to be relieved from the stay and for the vacation of the order declaring the cause of action abandoned, but this did not involve the necessity of vacating the order which required security to be filed for costs.

Plaintiff's right could have been protected by vacating the stay to the extent of authorizing the motion to be made to vacate the order of abandonment.

We, therefore, reach the conclusion that the order vacating security for costs should be reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and MCLAUGHLIN, JJ. concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

GEORGE W. SAUER, Appellant, v. THE CITY OF NEW YORK Respondent.

Elevated viaduct for street purposes over a street of which the fee is in the city — the damage to an abutting owner is damnum absque injuria.

An owner of property abutting on One Hundred and Fifty-fifth street in the borough of Manhattan, city of New York, the fee of which street is held by the city in trust for highway purposes, is not entitled, in the absence of any statutory provision therefor, to any legal or equitable relief on account of the construction by the public authorities of the city of New York, pursuant to chapter 576 of the Laws of 1887, of the elevated viaduct above and upon One Hundred and Fifty-fifth street, which viaduct was built to facilitate public travel and is used exclusively for ordinary street uses and purposes.

The damage suffered by the abutting owner by reason of the construction of the viaduct is *damnum absque injuria.*

APPEAL by the plaintiff, George W. Saner, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 14th day of September, 1903, upon the decision of the court, rendered after a trial at the New York Special Term, dismissing the plaintiff's complaint upon the merits.

Abram I. Elkus, for the appellant.

Edward J. McGuire, for the respondent.

LAUGHLIN, J.:

The plaintiff owns the premises situate at the southwesterly corner of Eighth avenue and One Hundred and Fifty-fifth street, having a

frontage of one hundred and seventy-five feet on One Hundred and Fifty-fifth street and forty-nine feet and eleven inches on Eighth avenue. He brings this suit in equity to enjoin the defendant from using the viaduct constructed above and along One Hundred and Fifty-fifth street and to compel the removal of the same and to recover consequential damages. The city owns the fee to One Hundred and Fifty-fifth street and to Eighth avenue and holds the same in trust for public highway purposes. Prior to the 15th day of June, 1887, One Hundred and Fifty-fifth street had been regulated and graded from Eighth avenue westerly to Bradhurst avenue which runs along the foot of a bluff about seventy feet high. One Hundred and Fifty-fifth street as laid out upon the records ascends this bluff and continues on westerly to the North river. It was opened, regulated and used from the bluff toward the west, but there was no access from Bradhurst avenue up the bluff to the street above, or from the street above down. From Bradhurst avenue to the Harlem river was a substantially level plain. An elevated bridge known as McComb's Dam bridge was constructed over the Harlem river from the easterly end of One Hundred and Fifty-fifth street. By chapter 576 of the Laws of 1887, which became of force on the fifteenth day of June of that year, the Legislature authorized the commissioner of public works of the city of New York with the approval of the board of estimate and apportionment "to improve and regulate the use of One Hundred and Fifty-fifth street" by erecting and constructing over and along One Hundred and Fifty-fifth street from McComb's Dam bridge to St. Nicholas place at the top of the bluff, an elevated iron roadway, viaduct or bridge, with "the necessary abutments, arches over intersecting avenues and approaches thereto for the passage of animals, persons, vehicles and traffic." Plans and specifications for the viaduct were prepared and duly approved and the viaduct was constructed in accordance therewith. The street and avenue are each one hundred feet in width. The platform of the viaduct embracing a carriageway of paving blocks and sidewalks of asphalt is sixty-three feet wide. It is built upon two lines of iron columns, each one foot and six inches square resting on the roadway of the street below. The columns are forty feet apart measured from center to center across the roadway and forty-three

feet longitudinally. There is a space of about ten feet between the columns and the curb on either side. The southerly edge of the platform above is distant eighteen feet and three inches at right angles from the northerly line of the plaintiff's premises. The platform over Eighth avenue is widened for the distance of eighty feet, forming a quadrilateral one hundred and sixty feet in length up and down Eighth avenue and eighty feet in width of the same character and method of construction as the main platform. At this point and in front of the plaintiff's premises the platform is about fifty feet above the surface of the original street. Two of the columns supporting the platform are on the sidewalk of Eighth avenue about fifteen and one-half feet from the line of plaintiff's land and the platform over Eighth avenue is ten feet distant at right angles from the line of his premises. The viaduct slopes from west to east from the brow of the hill to the level of the roadway of McComb's Dam bridge. A stairway extends from the platform of the viaduct within the lines of One Hundred and Fifty-fifth street to the southwesterly corner of One Hundred and Fifty-fifth street and Eighth avenue for the use of pedestrians in ascending or descending and there is a similar stairway opposite on the northerly side of the street. There is also another platform constructed underneath over One Hundred and Fifty-fifth street and Eighth avenue on a level with the elevated railway station connecting with these stairways and thus affording access to the station. The surface of the street below as it existed prior to the construction of the viaduct has not been changed and it remains open and unobstructed for public travel, except by these stairways and pillars.

The structure undoubtedly somewhat interferes with ingress and egress to and from plaintiff's premises and with light and the circulation of air, but in our opinion these constitute *damnum absque injuria*. The structure was authorized and has been constructed for the purpose of facilitating public travel on One Hundred and Fifty-fifth street, a purpose for which the city holds the fee to that street in trust. The Legislature evidently deemed that, owing to the elevation of this bluff, the difficulty if not impossibility of constructing the street up the bluff and the elevation of the bridge at the easterly end of the street, the convenience of the public would be best subserved by having a roadway and sidewalks above

as well as a roadway and sidewalks below, and having them connected by stairways. The street overhead as well as that on the natural surface of the ground has been constructed and used exclusively for public travel and for ordinary street uses and purposes. At common law an abutting owner has no redress for the incidental damages sustained by him by any improvement made in the street to facilitate public travel therein, even though the improvement may consist of a serious change of grade of the street rendering his property inaccessible. In these cases he has no remedy unless the Legislature sees fit to authorize the payment of his damages. In the case at bar the Legislature passed a special act designed to afford the plaintiff relief by compensation for the damages sustained. (Laws of 1894, chap. 512.) Whether the act will be effectual for the purpose is of no importance in the determination of the question now presented. The plaintiff has no easement for light, air and access, as against the public, which will enable him to enjoin the making of any changes or alterations, in the street authorized by the Legislature to facilitate public travel. This being the character of the improvement made, the action cannot be maintained and the complaint was properly dismissed.

It follows that the judgment should be affirmed, with costs.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and HATCH, JJ., concurred.

Judgment affirmed, with costs.

DELIMA TRAMBLAY, Appellant, *v.* THE SUPREME COUNCIL, CATHOLIC BENEVOLENT LEGION, Respondent.

Estoppel — a fraternal assessment life insurance association, estopped by the acceptance of dues to contest a certificate in favor of a "dependent," on the ground that she was not a dependent.

A fraternal assessment life insurance association, whose constitution provides for the payment, upon the death of a member, of death benefits "to the family or dependents of such member as he shall have directed," which issues a certificate, in which the beneficiary is designated as "Delima Tramblay, dependent," and then continues, for a period of fifteen years thereafter, and until the death of the member, to accept dues and assessments, without raising the objection that the beneficiary was not in fact a dependent of the member, and that the certifi-

cate was null and void on the ground that its issue was *ultra vires*, is estopped from asserting that objection after the member's death, where it is neither averred nor claimed that the association was induced to issue the certificate in question by any deception or fraudulent representation.

APPEAL by the plaintiff, Delima Tramblay, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 20th day of June, 1903, upon the decision of the court, rendered after a trial before the court without a jury at the New York Trial Term, dismissing the plaintiff's complaint upon the merits.

T. M. Tyng, for the appellant.

John C. McGuire, for the respondent.

LAUGHLIN, J.:

This is an action on a beneficiary certificate issued by the defendant, a fraternal assessment association, to one Louis Fontaine, a member, by which upon his death it promised to pay a beneficiary fund to the plaintiff. Fontaine died on the 1st day of April, 1901. He applied for membership in the defendant by an application in writing dated the 9th day of April, 1886, in which he designated his daughter Henrietta as the beneficiary subject to change pursuant to the laws of the defendant. A beneficiary certificate was issued to him on the 11th day of April, 1886, in accordance with the designation contained in the application. On the 1st day of September, 1886, he surrendered this certificate to the defendant, in the form and manner required in case of a change of designation of beneficiary, and requested that a new certificate be issued designating "Delima Tramblay dependent" as his beneficiary. The defendant duly accepted the surrender of the first certificate and issued to the deceased member a new certificate dated the 1st of September, 1886, in and by which — upon condition that the material statements contained in his application and in the medical examination were true and that he would strictly comply with the laws, rules and regulations of the legion — it agreed, upon the death of the member in good standing, to pay out of its benefit fund to "Delima Tramblay dependent" the sum to recover which this action was brought. This certificate was duly accepted by him in writing.

The contention of the defendant is that the plaintiff was not a

"dependent" within the intent and meaning of the constitution, by-laws and beneficiary certificate, and that, therefore, the beneficiary certificate is null and void on the ground that its issue was *ultra vires.* The defendant was incorporated on the 12th day of September, 1881, pursuant to the provisions of "An act concerning charitable, benevolent and beneficiary associations, societies and corporations," passed May 12, 1881. (Laws of 1881, chap. 256.) Its constitution provides that the particular business and object of the corporation, among other things, shall be "to afford moral and material aid to its members and their dependents by establishing a fund for the relief of sick and distressed members, and a Benefit fund, from which, on satisfactory evidence of the death of a member, who shall have complied with all its lawful requirements, a sum not exceeding five thousand dollars shall be paid to the family or dependents of such member as he shall have directed." The plaintiff alleged not only the issuance of the beneficiary certificate, but also that she was in fact from the time the certificate was issued to the time of Fontaine's death, "a dependent of the said Louis P. Fontaine, to wit, his housekeeper." The answer admits the surrender of the first certificate and the issuance of the certificate upon which the plaintiff claims, but it is therein alleged that the plaintiff is not and never has been a member of the decedent's family, nor dependent upon him within the meaning of the charter, constitution and by-laws of the defendant, or so related to him as to entitle her to be named as his beneficiary, or to entitle her to receive the beneficiary fund. It is alleged in the complaint and admitted that no other change of beneficiary was made, and that Fontaine continued to pay his regular dues and assessments until the time of his death, and was then a member in good standing.

At the commencement of the trial the plaintiff moved for judgment upon the pleadings upon the theory that the defendant was estopped from contending that the plaintiff was not a "dependent." This motion was denied. The plaintiff then rested her case upon the admissions contained in the pleadings. The defendant thereupon moved for a dismissal of the complaint upon the ground that the plaintiff had failed to show that she was a "dependent" of the deceased within the intent and meaning of the defendant's constitution, by-laws and the beneficiary certificate. The court denied the motion. The defendant thereupon, under plaintiff's objection and

exception that it was estopped therefrom, gave evidence tending to show that the plaintiff, when about twelve or thirteen years of age, became a member of decedent's family, which then consisted of the decedent, his wife, son and daughter; that she remained there about two or three years, and was known as the decedent's daughter or niece; that she then left for the purpose of bettering her condition, or was required to leave by the decedent's wife, who accused her of improper relations with the decedent; that shortly thereafter decedent and his wife separated on account of the plaintiff; that a few years thereafter the plaintiff was living with the deceased mem ber as his housekeeper and was known and addressed as his wife, and was so living with him at the time of the issuance of both beneficiary certificates. At the close of the case the court reserved its decision. In the opinion which was subsequently filed the court states that this evidence, which was received under plaintiff's objection and exception, was disregurded and excluded from consideration, and judgment was directed for the defendant upon the theory that the designation of the plaintiff as a beneficiary was nugatory.

We think the defendant was estopped from claiming that the certificate was invalid on the theory that it had not authority to issue the same except to a member of the family of the decedent or to some one having a lawful claim upon him for support. It is neither averred nor claimed that the defendant was induced to issue the certificate designating the plaintiff as the beneficiary by any deception or fraudulent misrepresentation; nor is its cancellation demanded or sought.

The decedent was under no obligation to continue his membership or the payment of assessments. The presumption is that during the fifteen years which elapsed between the issuance of this certificate and the death of the member he remained a member and paid his dues, relying upon the faith of this certificate that the plaintiff would be the recipient of the moneys due from the defendant upon his death. It cannot be assumed, in view of the change of designation of beneficiary, that he would have continued paying assessments, either for his previously designated beneficiary or as a gift to the defendant. He evidently considered that the plaintiff was dependent upon him for support, and felt obligated to support her, and it cannot be said that he did not act in good faith with the

association in making the designation. Whether he was unduly intimate with her or not, she had lived in his household and devoted her services to him during the best part of her life without other compensation, so far as appears, than her living expenses. In the absence of fraudulent misrepresentation on the part of the decedent, if the association did not wish to acquiesce in his opinion that the newly-designated beneficiary was a "dependent" within the meaning of its constitution and by-laws, it should have required him to state the facts constituting her dependence, or it should have investigated the facts independently. It should not be permitted to acquiesce in this designation and receive his assessments and dues for this long period of time and then, after his death, refuse to honor the certificate. In these circumstances the defendant is fairly estopped from contesting the validity of the certificate as an *ultra vires* contract. (*Vought* v. *Eastern Bldg. & Loan Assn.*, 172 N. Y. 508; *Booth Brothers* v. *Baird*, 83 App. Div. 495.) These views render it unnecessary to determine whether the plaintiff was in fact within the class intended to be included by the word "dependent" as used in the constitution and by-laws of the defendant.

It follows that the judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and HATCH, JJ., concurred.

Judgment reversed and new trial granted, with costs to appellant to abide event.

ADELINE WETYEN, Plaintiff, *v.* PETER W. FICK and ANNA M. C. FICK, Defendants.

The Statute of Limitations applicable to an action for dower — absence from the State of the parties against whom it is brought does not stop the running of the statute.

Section 1596 of the Code of Civil Procedure, which provides that an action to recover dower must be commenced by the widow within twenty years after the death of her husband, unless, at the time of the death of her husband, she is a minor, insane or imprisoned, or unless the right of dower has been recognized by a writing under seal, or has been adjudged by a decree of the court,

and that in each of such cases the time of such disability and the time subsequent to the husband's death and previous to the recognition or adjudication of the claim of dower, shall be excluded from consideration, affords an exclusive Statute of Limitations in actions for dower, and section 401 of the Code of Civil Procedure, which provides that where, at the time a cause of action accrues against a person he is without the State, the action may be commenced within the time limited after he returns to the State, and that if, after a cause of action accrues against a person, he departs from the State and remains continuously absent therefrom for one year or more, the time of such absence is not a part of the time limited for the commencement of the action, does not apply to actions for dower.

VAN BRUNT, P. J., dissented upon another ground.

SUBMISSION of a controversy upon an agreed statement of facts, pursuant to section 1279 of the Code of Civil Procedure.

David D. Ackerman, for the plaintiff.

Henry Hill Pierce, for the defendant Peter W. Fick.

Herbert M. Johnston, for the defendant Anna M. C. Fick.

LAUGHLIN, J.:

The controversy between the parties is not clearly stated, but it is evident that the plaintiff claims dower in the premises described which are situated in the county of New York, and that her right to dower and the method of admeasuring the same are disputed by the defendants. The principal question is whether or not the Statute of Limitations has run against her cause of action for dower. Her husband died on the 29th day of March, 1863, seized in fee simple of the premises. She made no demand or claim for dower until the 24th day of March, 1903. Her deceased husband resided in New Jersey at the time of his death and left a last will and testament which was duly admitted to probate in the Orphans Court in Bergen county, N. J., on the 10th day of April, 1863, and a certified copy thereof was duly recorded in the office of the clerk of the county of New York on the 29th day of September, 1879. The testator left four children. He bequeathed to the plaintiff an annuity of $1,200 per annum for the support and maintenance of herself and children until his youngest child should arrive at the age of twenty-one years. After providing for the payment of his debts, funeral expenses and the annuity and certain other annuities,

he gave the rest, residue and remainder of his estate, both real and personal, to his children, share and share alike, upon the youngest attaining the age of twenty-one years, with a provision that upon the death of any child without issue before attaining the age of twenty-one years his or her share should go to the surviving children. Two of the children died without issue before attaining their majority. One of the two surviving children subsequently conveyed his interest to his sister who died intestate on the 19th day of July, 1880, leaving her surviving her husband and her daughter, her only heir at law, and they are the sole defendants. If the plaintiff is not entitled to dower it appears that the defendant Peter W. Fick is a tenant by the curtesy of the entire premises and that the other defendant owns the remainder. It thus appears that forty years, less five days, elapsed between the death of the plaintiff's husband and the time she first asserted a claim to dower in the premises.

The defendants contend that section 1596 of the Code of Civil Procedure furnishes an exclusive rule of limitations governing the commencement of actions for dower, and that inasmuch as the plaintiff was not within any of the exceptions or disabilities therein specified which extend the time, the action cannot be maintained for the reason that it was not commenced within twenty years after the death of the plaintiff's husband. It is not shown or claimed that the plaintiff was at any time within any of the disabilities or exceptions specified in that section. If that section was intended as an exclusive rule of limitations applicable to actions for dower then the contention of the defendants must be sustained. The plaintiff, however, claims that section 401 of the Code of Civil Procedure is applicable to actions for dower. That section is contained in chapter 4 of the Code of Civil Procedure entitled "Limitation of the Time of Enforcing a Civil Remedy," and it provides, among other things, that where at the time a cause of action accrues against a person he is without the State the action may be commenced within the time limited therefor after his return into the State; and if, after a cause of action accrues against a person he departs from the State and remains continuously absent therefrom for one year or more, the time of such absence is not a part of the time limited for the commencement of the action. On the day of the death of the testator the parties and the deceased children were and resided in

the State of New Jersey, and they thereafter resided and remained there with the exception that the plaintiff and her four children resided in the State of New York for a period of about eight years immediately after the death of her husband and the defendants resided in the State of New York for a period of about one year after the 19th day of July, 1880. The defendants since 1880 have claimed and collected the rents and profits, and are now in possession of the premises claiming title thereto, and the taxes and water rates have been paid by them and their predecessors in title. It does not otherwise appear whether the premises have been actually occupied or by whom. On submissions we are not at liberty to infer facts, and, consequently, it may not be assumed that there was an actual occupant of the premises against whom the action might have been maintained within twenty years after the testator's death under section 1597 of the Code of Civil Procedure without making the defendants parties. The case must, therefore, be considered upon the theory that the defendants or their predecessors in title were necessary parties under the section of the Code last cited. It thus appears that if the provisions of section 401 are applicable the Statute of Limitations has not run against the plaintiff's right of action for dower. Numerous actions and classes of actions embracing the great majority of civil actions — but not actions for dower — are enumerated in said chapter 4 of the Code of Civil Procedure and the limitation of the time for commencing the same is therein prescribed. Section 401 although contained in that chapter is not, strictly speaking, a statute of limitations. It merely excepts from the operation of the statutes, to which it is intended to apply, for the period specified causes of action against persons who are without the State when the cause of action accrues or who thereafter depart from the State and remain continuously absent for at least a year, or who reside within the State under a false name without the knowledge of the person entitled to maintain the action.

Section 414 of the Code of Civil Procedure, being the second last section of chapter 4, provides that the provisions of that chapter "apply, and constitute the only rules of limitation applicable, to a civil action or special proceeding," except in a case "where a different limitation is specially prescribed by law or a shorter limitation is prescribed by the written contract of the parties;" and except

also in certain other cases which concededly have no application to the question before us. Section 1822 of the Code of Civil Procedure provides that where an executor or administrator disputes or rejects a claim, unless the written consent of the parties for the determination of the claim by the surrogate shall be filed with the surrogate, the claimant must commence an action for the recovery thereof within six months after the dispute or rejection, or, if no part is then due, within six months after a part thereof becomes due. This section contains no exception on account of disability or absence from the State or otherwise to the running of the six months' Statute of Limitations. It has been held that the cases therein enumerated fall within the exception quoted from section 414 and that, therefore, section 1822 is the Statute of Limitations which governs, but that section 401 is also applicable to such actions and that, consequently, the statute does not run during the period excepted by section 401. (*Hayden* v. *Pierce*, 71 Hun, 593; affd., 144 N. Y. 512.) In *Titus* v. *Poole* (145 N. Y. 414), where an action for fraud had been brought against executors upon a rejected claim within six months as prescribed in section 1822 and the plaintiff was nonsuited, it was held that section 405, which is contained in said chapter 4, was applicable and that a new action upon the claim upon the theory of a warranty might be commenced within one year after the determination of the first action. In *Simonson* v. *Nafis* (36 App. Div. 473) the court, speaking of section 401 of the Code of Civil Procedure, say, "The section is comprehensive in its terms and includes all limitations of time prescribed in the Code," but the point decided in that case was that this section applied to an action to foreclose a mortgage, the limitation for commencing which is prescribed in section 381, being in the same chapter of the Code. In *Fowler* v. *Wood* (78 Hun, 304; affd. on opinion below, 150 N. Y. 584), which was also an action to foreclose a mortgage — the limitation for bringing which was prescribed in said chapter 4 — the point decided was that the suspension of the running of the Statute of Limitations on a cause of action against a person who is absent from the State did not sustain the running of the statute against another liable on the same cause of action who remains within the State. In *Hamilton* v. *Royal Insurance Company* (156 N. Y. 327) the only point decided was that section 399 of the Code of Civil Procedure, which provides

that an attempt to commence an action in a court of record by delivering the summons to a sheriff with directions to serve it applies in determining whether an action on an insurance policy has been commenced within the stipulated time. The time for bringing that action was fixed by the written contract of the parties and, therefore, the limitation of time was within the exception prescribed in said section 414. The court, therefore, merely held that in determining whether the action was commenced within the stipulated time, section 399, which prescribes what shall be deemed the commencement of an action for the purpose of the running of the Statute of Limitations, was applicable. These are the cases upon which the plaintiff relies and we are of the opinion that none of them is controlling upon the question at bar. Section 1596 is contained in article 3 of title 1 of chapter 14 of the Code, which chapter is entitled "Special Provisions Regulating Actions Relating to Property," and said article 3 relates exclusively to actions for dower. The language of the section is significant as indicating that it was intended as an exclusive Statute of Limitations in actions for dower. It is first prescribed that such an action *must* be commenced by the widow within twenty years after the death of her husband, and then it provides that if she is "at the time of his death either (1) Within the age of twenty-one years, or (2) Insane, or (3) Imprisoned on a criminal charge or in execution upon conviction of a criminal offense, for a term less than for life;" that the time of such disability shall be excluded from the time limited for commencing the action. It further provides that if at any time before the claim of dower has become barred "by the above lapse of twenty years, the owner or owners of the lands subject to such dower being in possession shall have recognized such claim of dower by any statement contained in a writing under seal, subscribed and acknowledged in the manner entitling a deed of real estate to be recorded, or if by any judgment or decree of a court of record within the same time and concerning the land in question, wherein such owner or owners were parties, such right of dower shall have been distinctly recognized as a subsisting claim against said lands, the time after the death of her husband and previous to such acknowledgment in writing or such recognition by judgment or decree, is not a part of the time limited by this section." The first part of the section

specifying the limitation and the exception relating to age, insanity and imprisonment on a criminal charge or conviction was taken from the Revised Statutes and the latter part of the section was added by chapter 277 of the Laws of 1882 (Note to Throop's Annotated Code Civ. Proc. [1892 ed.], § 1596). The time within which an action for dower might be instituted was not limited either at common law or by the Revised Laws. (*Sayre* v. *Wisner*, 8 Wend. 661; *Ward* v. *Kilts*, 12 id. 137; 1 R. L. 60, § 1; R. L. 1813, chap. 168, § 1.) The first limitation was prescribed by the Revised Statutes (1 R. S. 742, § 18; R. S. part 2, chap. 1, tit. 3, § 18), and this was a limitation of twenty years as at present. The commissioners appointed to revise the statutory law in recommending this limitation said "if it be an object in any case to quiet titles, to protect honest purchasers and to excite to a vigilance equally beneficial to the claimant and to others, it is conceived that this case requires the necessary provisions to attain it, as much, if not more, than any other." (3 New York Revisers' Reports, 75.) There is no difficulty or hardship in the construction which requires that an action for dower shall be commenced within twenty years after the death of the husband, regardless of whether the necessary defendants are residents or non-residents of the State. The location of the land within the State gives the court jurisdiction, and if the necessary defendants are non-residents they may be served by publication. The action does not require the award of a personal judgment. It operates upon the land and against those interested therein. If, as contended by the learned counsel for the plaintiff, section 401 of the Code of Civil Procedure is applicable to such actions, then the Statute of Limitations would be of little value in its practical application. The marketability of a title where there was ever an outstanding right of dower which had not been satisfied or released of record would be seriously affected. Whether there existed a valid enforcible claim for dower would necessarily depend upon facts *dehors* the record and resting in parol which it would be difficult to ascertain with any degree of certainty. It would involve an inquiry as to who the parties were against whom the action might have been maintained and whether they resided within the State during a period of twenty years. It would be difficult to make such a title market-

able by affidavits; and it would result in a hardship to the owner by putting him to the trouble and expense of obtaining affidavits which might be attended with great difficulty, or of procuring releases of claims for dower which had already become outlawed.

The Code is susceptible of the construction that section 1596 is an exclusive Statute of Limitations in actions for dower and prescribes the only disabilities and exceptions to the running of the statute, and the rights of the owners of land require this construction.

It follows from these views that the Statute of Limitations has run against the plaintiff's right of action for dower and that the defendants are entitled to judgment accordingly, without costs.

O'BRIEN and MCLAUGHLIN, JJ., concurred; PATTERSON, J., concurred in result; VAN BRUNT, P. J., dissented upon the ground that the submission is not in such a form that the court could act.

Judgment directed for defendants, without costs.

SALOMON LANDAU, as Administrator, etc., of GEORGE LANDAU, Deceased, Respondent, v. THE CITY OF NEW YORK, Appellant.

Failure to enact or enforce ordinances — repeal thereof — liability of a city in respect thereto and for the acts or omissions of the police — effect of the suspension of an ordinance relating to the use of fireworks in New York city — killing of one in the street by a premature explosion — proof that no accident had previously happened — evidence as to the display being a nuisance.

A city is not liable for a failure to enact and enforce ordinances, nor for the repeal of any ordinance.

The suspension of an ordinance does not constitute a license to do the acts prohibited by the ordinance, but merely prevents a prosecution for the penalty imposed by the ordinance during the period of such suspension.

The passage by the board of aldermen of the city of New York and the approval by the mayor of that city of the following resolution: "*Resolved*, that the ordinances relating to the discharge of fireworks in the city of New York be and the same are hereby suspended so far as they may apply to meetings and parades of political parties or associations during the campaign of 1902; such suspension, however, to continue only until November 10, 1902, and to be subject

to such restrictions and safeguards as the Police Department may determine as necessary," does not render the city liable for the damages resulting from the death of a person, who, while on a public street in said city on November 4, 1902, was killed by the premature explosion of fireworks which were being set off in the street by a political organization, where it appears that, although the resolution was transmitted by the city clerk without action on the part of the board of aldermen to the police department of the city, no one connected with the police department was applied to or gave any permission for the display of fireworks or did anything concerning the matter except to endeavor to regulate the crowd.

The resolution cannot be construed as conferring authority on the police department to license the display of fireworks during political celebrations, for the reason that it would not be competent for the board of aldermen thus to delegate legislative power, and for the additional reason that this was not the intention of the resolution and was not so understood by the police department.

The city is not liable for the acts or omissions of the members of the police force.

In any event, it is improper for the court to refuse to allow the city to show that similar exhibitions with the same kind of fireworks had been given a great number of times without accident, and to refuse to submit to the jury the question whether the display of fireworks constituted a nuisance.

APPEAL by the defendant, The City of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 28th day of May, 1903, upon the verdict of a jury for $1,612.26, and also from an order entered in said clerk's office on the 9th day of June, 1903, denying the defendant's motion for a new trial made upon the minutes.

This is a statutory action to recover for the death of George Landau alleged to have been caused by the negligence of the defendant. On the evening of November 4, 1902, which was election day, the National Association of Democratic Clubs, which had its headquarters at the Hoffman House, had a parade and was celebrating the supposed result of the election by a display of fireworks on the park side of Madison avenue between Twenty-fourth and Twenty-fifth streets. The decedent was in the neighborhood of Twenty-fourth street and Madison avenue and met his death by an explosion of fireworks which occurred about ten o'clock. On the 21st day of October, 1902, sections 718 and 719 of the revised ordinances of the city of New York, theretofore duly adopted by the municipal

legislative body pursuant to authority granted by the Legislature, were then in force and provided as follows:

"§ 718. No person shall fire, discharge or set off in the city of New York any rocket, cracker, torpedo, squib, balloon or other fireworks or thing containing any substance in a state of combustion under the penalty of five dollars for each offense. The provisions of this section shall not apply to the grounds at the southeast corner of One Hundred and Twenty-seventh street and Fifth avenue.

"§ 719. No person shall sell, or expose for sale, nor fire, discharge or set off in the city of New York any fireworks called or known by the name of 'snakes' or 'chasers,' or any fireworks called or known by the name of 'double headers,' nor any fireworks under any other name composed of the same material and of the same character as those fireworks specified in this section, under the penalty of fifty dollars for each offense, to be sued for and recovered of the person selling or exposing the same for sale, firing off or discharging the same. And in case such person shall be an apprentice, such penalty shall be sued for and recovered of and from the master of such apprentice. In case such person shall be a minor and not an apprentice, the same shall be sued for and recovered of and from the father, or in case of the death of the father, then of and from the mother or guardian of such minor."

On the last-named day the board of aldermen adopted a resolution as follows:

"*Resolved*, That the ordinances relating to the discharge of fireworks in the City of New York be and the same are hereby suspended so far as they may apply to meetings and parades of political parties or associations during the campaign of 1902; such suspension, however, to continue only until November 10, 1902, and to be subject to such restrictions and safeguards as the Police Department may determine as necessary."

This resolution was approved by the mayor on the 27th day of October, 1902. Thereafter and prior to the day in question the city clerk, without further action of the board of aldermen, transmitted a copy of this resolution to the commissioner of police, who in turn transmitted a copy to all borough inspectors of police, precincts and squads, with a letter saying that it was transmitted for their information and guidance. It appears that Inspector Brooks on the

night in question had charge of the police in the territory bounded by Twenty-eighth street, Fourth avenue, Twenty-second street and Fifth avenue, consisting of about 700 men. On the previous day the inspector saw an announcement in one of the daily papers of the intended parade and display of fireworks which was to the effect that the fireworks were to be set off from the top of the Flatiron building. On election day he sent a sergeant to obtain more definite information about the parade and fireworks and thus ascertained that the fireworks were to be both on Madison avenue and in front of the Worth monument. It was reported to the inspector about three o'clock in the afternoon that preparations were being made in Madison avenue between Twenty-fourth and Twenty-fifth streets for sending off the fireworks. The inspector had 500 policemen on duty that night in and about Madison square, and he detailed 2 sergeants, 2 roundsmen and 85 of this number to cover Madison avenue between Twenty-third and Twenty-sixth streets with a view to having them regulate and protect the crowd in the vicinity of the fireworks. The fireworks display commenced about nine-twenty P. M., and at that time it is estimated there were about 75,000 people in and about Madison square watching the announcement of election returns and the display of fireworks. The fireworks consisted of sky rockets, flower pots and bombs. The bombs were fired from mortars by lighting a fuse. Neither the size of the mortars nor the nature nor character of the bombs is disclosed other than that they were of the kind commonly used for such purposes. There were several rows of mortars made of steel tubing. The mortars were in the carriageway of the avenue in rows extending north and south. The longest row appears to have been about twenty-five or thirty feet, and there were five or six shorter rows, covering altogether eight or ten feet in width of the carriageway, commencing at a distance variously given as ten to eighteen feet from the westerly curb. It appears that there was difference in the size of the mortars and that the larger ones rested on the pavement and the smaller ones in barrels of sand. It appears that some considerable time before the accident bombs had been fired from the southerly end of the long row without accident, but when they reached the northerly end there was a premature explosion of some of the fireworks, followed by a general explosion, with great violence, killing and injuring a

great many people. The cause of the explosion does not definitely appear. At this time crowds lined both sidewalks and curbs around the fireworks. It appears that the fireworks were obtained from Paine, who has attained a wide reputation with respect to display of fireworks. No one connected with the police department was applied to for or gave any permission for the display or gave any directions or did anything concerning the same, except in endeavoring to regulate the crowd and keep the people back a reasonable distance.

Theodore Connoly, for the appellant.

Charles Steckler, for the respondent.

LAUGHLIN, J.:

We are of opinion that the city is not liable for this unfortunate accident. If it had happened before the municipal legislative body had enacted any ordinance prohibiting the discharge of fireworks, even though authority to enact such ordinances had been granted by the Legislature, or through its failure to enforce them if enacted, it is clear that there would be no liability. The rule is well settled that a municipality is not liable for its failure to enact or enforce ordinances. (*Leonard* v. *City of Hornellsville*, 41 App. Div. 106; *Griffin* v. *Mayor*, 9 N. Y. 456; *Lorillard* v. *Town of Monroe*, 11 id. 392; *Coonley* v. *City of Albany*, 132 id. 145; *Stillwell* v. *Mayor*, 49 N. Y. Super. Ct. 360; affd., 96 N. Y. 649; *Levy* v. *Mayor*, 1 Sandf. 465.) It follows logically that no liability can be predicated on account of the repeal of an ordinance. An ordinance may be repealed one day and enacted the following day, or a week, or a month, or a longer period later. The suspension of an ordinance is not a license to do the acts previously prohibited, but merely precludes a prosecution for the penalty during the period of such suspension the same in effect as if the ordinance were repealed. As well might it be said that the failure to enact an ordinance is a license to the public to do all things that might be prohibited by ordinance. The board of aldermen in enacting the ordinance originally might have excepted the fourth of July from its operation and might have excepted the display of fireworks during political parades or celebrations. Had it been so provided in the ordinance it could not

have been successfully maintained that this constituted a license from the municipality to all inhabitants to set off fireworks on the fourth of July and during political parades and celebrations, making the city responsible for any damages resulting therefrom. The situation would be in that event that the ordinance imposing the penalty and prohibiting the acts on other occasions did not apply on such occasions, and the liability as to such occasions would be the same as if the legislative power to enact ordinances had not been exercised at all. These views are sustained by numerous authorities. (*Howard* v. *City of Brooklyn*, 30 App. Div. 217; *Boyland* v. *City of New York*, 1 Sandf. 27; *Ball* v. *Town of Woodbine*, 61 Iowa, 83; *Lincoln* v. *Boston*, 148 Mass. 578; *Robinson* v. *Greenville*, 42 Ohio St. 625; *Borough of Norristown* v. *Fitzpatrick*, 94 Penn. St. 121; *McDade* v. *Chester City*, 117 id. 414; *O'Rourke* v. *City of Sioux Falls*, 4 S. D. 47; *Mayor & Council of Wilmington* v. *Vandegrift*, 1 Marv. [Del.] 5; *Wheeler* v. *City of Plymouth*, 116 Ind. 158; *Kelley* v. *City of Milwaukee*, 18 Wis. 83; *Hill* v. *Board of Aldermen of Charlotte*, 72 N. C. 55.)

Nor can it be successfully maintained that the board of aldermen authorized the police to license the display of fireworks during political celebrations. It would not be competent for the board of aldermen to thus delegate legislative power; nor was this the intention of the resolution suspending the ordinance in the particulars specified. The reference to the police department was made so that the members of the police force would understand that the board of aldermen did not intend by the action taken to interfere with the exercise of such authority as was invested in the police department, or possessed by the peace officers, to preserve law and order and prevent the destruction of life and property. The police officers were left in precisely the same condition concerning the display of fireworks on the night in question as if no ordinance had ever been enacted on the subject. Under their general police powers they were authorized to prevent the doing of an act in a public street dangerous to life or property; and to prevent this display of fireworks if in their opinion the same would constitute a nuisance or was likely to injure life or property. It does not appear that the police misunderstood the action of the board of aldermen in this regard — but of course that could not affect the liability of the city

— for they did not assume to license or permit this display of fireworks. Of course the city is not liable for the acts or omissions of the members of the police force.

A fair test for determining whether there was a license from the city is to inquire whether if the members of the police force had attempted to prevent a discharge of the fireworks which was dangerous to human life, those in charge could have presented any license or authority from the city for the acts which they were about to perform. In the case at bar, manifestly, they could not. The case is entirely unlike that of *Speir* v. *City of Brooklyn* (139 N. Y. 6), where the city was held liable for damages caused by a fire started by fireworks, discharged under a special license from the mayor, granted pursuant to the terms of an ordinance which prohibited the discharge of fireworks without such a license. In that case the legislative body, after determining that the discharge of fireworks was dangerous and prohibiting it under a penalty, assumed to license such dangerous acts on special application. Here there was no license to any of the residents or sojourners in this city. The city did not assume to permit the discharge of fireworks. It merely withdrew the penalty in certain instances for a specified period, leaving every individual or organization to the responsibility for his own acts in discharging any kind of fireworks. It did not assume to determine that a particular place was safe for the discharge of a particular kind of fireworks. It did not approve as safe the discharge of any kind of fireworks. It doubtless was not anticipated that individuals or political organizations would be so reckless as to discharge fireworks of a character endangering life in public places. It is a matter of common knowledge that there are many kinds of fireworks that may be discharged without danger to life, and such is the character of those generally used on these occasions. The principal danger to be apprehended from the discharge of fireworks, and that was intended to be guarded against by the ordinance, was the destruction of property by fire. It was doubtless expected that with greater vigilance on the part of the police force on these special occasions the danger to property might be minimized and the members of a political party or organization be permitted to show their enthusiasm in an innocent way by the discharge of ordinary harmless fireworks.

It being evident that all of the material facts upon which a liability could be predicated are before us, we have deemed it proper to express our views upon the merits of the case. But the judgment would have to be reversed in any event on account of an exception to the exclusion of evidence that similar exhibitions with the same kind of bombs had for a great many years been given several nights a week at Manhattan Beach without accident, and also to the court's refusal to submit the question to the jury as to whether this display of fireworks constituted a nuisance. The learned trial judge ruled that the city was liable as matter of law and only submitted to the jury the question of damages. The effect of this ruling was that the mere explosion constituted conclusive evidence that the acts were negligent or constituted a nuisance *per se*. The defendant, in any event, would have been entitled to show the character of the combustibles and the nature of the covering and to show the result of previous experiments with like combustibles in like quantities and casings as bearing on the question as to whether it was negligence to permit the fireworks to be set off at the place in question or as to whether the city could be charged with permitting the creation of a nuisance. It must be borne in mind that it is not claimed that the city was setting off these fireworks. The claim is that it licensed the political organization to do so.

It follows, therefore, that the judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event.

VAN BRUNT, P. J., INGRAHAM and HATCH, JJ., concurred; PATTERSON, J., concurred in reversal on grounds last stated in this opinion.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. ALFRED CHILDS, Appellant.

Murder — under what proof a "billy" should be received in evidence and be considered by the jury — the fact that the accused did not run away after the killing should be considered — good character may be a sufficient reason for believing that evidence adverse to the accused is false.

Upon the trial of an indictment for murder the defendant testified that, having been threatened with bodily harm by the deceased on several occasions, he purchased a revolver; that on the day when the killing took place he met the deceased in the street; that the deceased struck him with his fist and grappled with him, and that the defendant was unable to get away; that while the deceased was holding him, the defendant felt something hard under the deceased's coat which the latter was endeavoring to grasp; that, believing that it was a revolver, the defendant shot the deceased and killed him; that, when the deceased dropped, the defendant looked around to see if any of the deceased's friends were in sight; that he then turned and looked at the deceased and observed a club sticking out from underneath the deceased's coat; that the club which the defendant saw was very much like a club which was exhibited to him at the trial, but that he could not swear to its identity.

A policeman, who arrested the defendant almost immediately after the shooting, testified that after he had handcuffed the defendant he took him over to be identified by the deceased, who was lying where he fell; that while he was standing by the deceased someone in the crowd and near the deceased handed him the club which was exhibited to the defendant on the trial, saying, "Here is a billy."

Held, that the defendant was entitled to have the billy received in evidence and that the jury should have been instructed that if they found that it was the identical club that was in the possession of the decedent, as they might well have found upon the evidence, that then they could not disregard it, and that it became important evidence in connection with defendant's testimony that he felt it in decedent's pocket and that decedent was endeavoring to get hold of it with the apparent object of using it upon the defendant, and that, fearing that it was a revolver or deadly weapon of some kind and that his life was in peril, he shot the decedent in self-defense;

That it was error for the court to refuse to instruct the jury that they might "take into consideration the fact that the defendant remained at the scene of the homicide and did not run away," as the jury might have considered the failure of the defendant to run away as tending to show that the shooting was done in self-defense and without criminal intent;

That the evidence given on the trial having been conflicting, and the defendant having shown previous good character by the testimony of several witnesses, it was improper for the court to refuse to charge "that the character of the accused may be such as to create a doubt in the minds of the jury and lead

them to believe, in view of the improbability of a person of such character being guilty, that the other evidence is false;"

That the jury should have been instructed that they might consider the evidence of the defendant's good character in determining the truthfulness of the testimony indicating the defendant's guilt.

APPEAL by the defendant, Alfred Childs, from a judgment of the Court of General Sessions of the Peace in and for the city and county of New York in favor of the plaintiff, entered in the office of the clerk of said court on the 29th day of May, 1902, convicting the defendant of the crime of murder in the second degree, and also from an order entered in said clerk's office denying the defendant's motion for a new trial made upon the minutes.

Lewis Stuyvesant Chanler, for the appellant.

Robert C. Taylor, for the respondent.

LAUGHLIN, J.:

The People showed and the defendant, a witness in his own behalf, admitted that on the 2d day of April, 1902, shortly after one o'clock in the afternoon, the defendant shot and killed Patrick J. Malone with a pistol in front of the Army Building at the corner of Moore and Pearl streets, in the city of New York. The defendant claimed that he did the shooting in self-defense. He was employed by the Protestant Episcopal Church Missionary Society as a "runner" to solicit boarders and lodgers for the New Seamen's Home, 52 Market street, New York city. The decedent was employed as a runner by M. H. Murphy, who kept a sailors' boarding house. There was evidence tending to show an unfriendly feeling on the part of proprietors of sailors' boarding houses and their runners toward the New Seamen's Home and its employees engaged in soliciting patronage for it. The defendant testified that he had been in the employ of the missionary society for about a month; that on several occasions he had met the decedent and other runners for and some proprietors of sailors' boarding houses; that they had frequently threatened to "blow the Missionary Society's Home to hell, and the employees connected with it," and had threatened "to do me up" on several occasions; that at about ten o'clock on the morning of the homicide he met the decedent and three others who

had previously made these threats, and two others unknown to him, on South near Front street; that the six were together, and, as he approached them, they opened up and let him pass through between them; that, as he got through, the decedent with clinched fist hit him on the right shoulder; that he turned around and asked decedent what he was looking for, whereupon decedent called him out of name and made an insulting remark indicating a bitter feeling toward the missionary society and toward defendant on account of his connection with it, and thereupon one of the others hit him in the ribs and they all laughed at him; that he then walked away and went home and procured an old pistol, thinking that he would have to use it sooner or later, and believing that he needed some means of defense; that the pistol had five chambers all loaded since January, and was rusty; that he then went to luncheon and thought that it might be unsafe for him to use this pistol as it might explode in his hands, and, therefore, he bought a new revolver on the Bowery of the calibre of cartridge which he had brought from home with the rusty revolver, and went into the toilet room of a saloon and loaded its five chambers and then put the revolver in his left-hand outside overcoat pocket, leaving the rusty revolver loaded in his other outside overcoat pocket; that he then looked for another employee of the missionary society who also acted as a runner, but was unable to find him, and visited different places in the lower part of the city, where he was accustomed to obtain information or transact business, and, finally, shortly after one o'clock, came up Pearl from Whitehall street on the same side as the Army Building, and met the decedent a few feet from the corner of Moore street; that the decedent struck at him with his left fist, and he "ducked it" and hit the decedent in the face with his left fist; that the decedent then grabbed hold of him with both arms, holding the defendant's arms down; that defendant also caught hold of decedent and tried to get away but could not, and then tried to throw decedent, but was unable to do so; that defendant had seen one of decedent's friends who had previously threatened him in that vicinity about twenty minutes before, and thought decedent was holding him for others "to plug me or assault me;" that defendant felt something hard under decedent's coat and decedent reached toward and seized it with his right hand, and defendant thought decedent was about to

draw "this gun, or whatever he had underneath his coat—this thing I felt;" that defendant then took hold of decedent's right arm with his left hand, endeavoring "to hold him there," and at the same time reached for the new revolver which was in his left-hand outside overcoat pocket, and had some difficulty in getting it owing to the fact that decedent was holding him tight; that decedent was struggling "to get this thing, whatever it was, get it out of his pocket;" that defendant thought decedent had a gun there, and also thought there was some one behind him, and after he got hold of his revolver and his arm up far enough he pulled the trigger and decedent dropped; that decedent fell with his head against the Army Building and defendant turned around "to see if there were any more around there," and then turned and looked at the decedent and observed "a club about three inches long" "sticking out from underneath his coat." Defendant further testified concerning this club, "I could see that much. I could see three inches of the club. Whether he had a gun or not I don't know. It was very much like this club (showing witness club). It was very much like that, although I could not swear to it. I saw that club afterwards in the hands of the policeman. A young fellow gave the club to the policeman in my presence." The court then inquired whether the witness meant that the club produced in court or the one he saw decedent have was the one given to the policeman, and defendant's counsel answered, "This one here." The witness then further testified, "In my presence this club was given to the policeman. By a young man." The court then inquired whether the witness meant to say that the club exhibited in court was the identical club that he saw sticking out of the decedent's coat and the witness answered, "I couldn't swear to that. * * * It was just like it. At the time I was struggling with Malone and he had his hand on this hard substance that I felt, I apprehended that I was about to be killed. And that grievous bodily harm would be inflicted upon me. It was after that that I resorted to my pistol. After he put his hand underneath his coat. * * * It was with this feeling that I did as I have described." The defendant stepped back one or two paces and remained there "standing quietly" until a policeman came to whom he voluntarily handed the revolver and admitted that he had shot the decedent. The testimony of some of the witnesses for the People was to the

effect that he assigned as a reason for the shooting that decedent had assaulted him in the morning, and that of others was to the effect that he claimed to have fired in self-defense. A policeman who arrested him there almost immediately after the shooting testified that after he had handcuffed the defendant he took him over to be identified by the decedent who was still in the position where he fell, and as he did so and while standing by the decedent some one in the crowd and near decedent handed him this "billy," saying, "Here is a billy." Counsel for the defendant thereupon offered the billy in evidence. This was objected to and the objection was sustained and defendant excepted. The defendant before resting his case again offered the billy in evidence and the court remarked, "For the purpose of illustration I will allow the offer; it is not in evidence as the particular instrument which the defendant saw, but as one similar to one which he said he saw." No reference to the billy was made in the charge. The jury after retiring sent the following question to the court: "We would like to know what your Honor's charge was relative to the billy introduced in the case." The court, by consent of counsel, returned the following reply: "No reference to the billy was made in the charge of the Judge." Soon after the jury desired further instructions and were brought into court and through their foreman they asked, "*First*, was the billy placed in evidence before the jury? *Second*, are we to disregard it?" The only answer of the court to the first request was the reading of part of the testimony relating to the billy and the remarks of the court in receiving it in evidence for the purpose of illustration. In answer to the second request the court said: "That so long as the instrument called a 'billy' is in evidence for the purpose so expressed by the Court when it was admitted in evidence, not as the identical instrument that the defendant claimed to have seen, but as one similar to it, it was in for the purpose of illustration, and, therefore, it is for your consideration. You may regard it as of value and you may disregard it as of no value. It is wholly a question for your determination; it is before you for the purpose indicated, and it lies with you to attach what importance to it you think proper or disregard it wholly if you think proper. It is a question of fact wholly resting with you." Counsel for the defendant thereupon excepted to these

instructions and requested the court to instruct the jury that the billy was in evidence and that the jury could not disregard it. The court declined and counsel for the defendant excepted. The foreman of the jury then asked whether the law made this billy a deadly weapon or described it as such, to which the court answered in the negative; and to this counsel for defendant also excepted.

We are of opinion that the defendant was entitled to have the billy received in evidence and that the jury should have been instructed that if they found that it was the identical club that was in the possession of the decedent, as they might well have found upon the evidence, that then they could not disregard it and that it became important evidence in connection with defendant's testimony that he felt it in decedent's pocket and that decedent was endeavoring to get hold of it with the apparent object of using it upon the defendant, and that, fearing that it was a revolver or deadly weapon of some kind and that his life was in peril, he shot the decedent in self-defense. According to the witnesses for the People the defendant was the aggressor and first assaulted decedent with his fist, and then, without their clinching and with nothing to prevent defendant's firing from in front, he closed in on decedent and fired from behind the latter's head, the ball entering about an inch back of the left ear and passing forward and upward, lodging near the skull on a line with the right ear. As has been seen, the rights of the defendant were not protected by any reference in the charge either to this billy or to the club that was in decedent's pocket if it be not the same. It is manifest from the questions asked by the jury that they regarded it as of considerable importance; and it is also evident, I think, that they believed, and the evidence justified a finding, that it was the identical club or billy that was in the possession of the decedent. The refusal of the court to admit it in evidence generally, and the failure of the court to instruct them properly upon its bearing as evidence, could scarcely fail in these circumstances to prejudice the defendant.

The court was also requested to instruct the jury that "they may take into consideration the fact that the defendant remained at the scene of the homicide and did not run away." This was a significant fact, and the jury, had their attention been drawn to it, might have considered that it tended to show that the shooting was done

in self-defense and without criminal intent. Had the defendant, instead of remaining there, endeavored to escape it would have been considered as tending to show his guilt. No reference to this fact was made in the charge. We think the defendant was entitled to have the attention of the jury drawn thereto by the court; and that it was error to refuse the request.

Defendant showed previous good character by the testimony of several reputable witnesses. Counsel for the defendant requested the court to instruct the jury "that the character of the accused may be such as to create a doubt in the minds of the jury and lead them to believe, in view of the improbability of a person of such character being guilty, that the other evidence is false." This was declined and defendant excepted. As has been seen, there was a conflict of evidence with reference to the circumstances under which the shooting occurred. The evidence on the part of the People tended to show not only that the defendant was the aggressor, but also that the circumstances under which he provoked the quarrel indicated that he had armed himself, not for the purpose of using the weapons in self-defense, but for the purpose of murdering decedent. This evidence, however, was not of a conclusive character. In the main, it depended upon the credibility of the testimony of friends of decedent and rivals of the defendant. In these circumstances, he was entitled to have the jury fully and clearly instructed as to the effect that might be given to the evidence of previous good character. In *People* v. *Elliott* (163 N. Y. 14) the Court of Appeals reversed a conviction of rape for a failure to charge a request in the identical language of the request refused in the case at bar. It follows that the proposition contained in the request is sound. It contains one element, at least, that was not covered by the charge. The main charge as to the effect of character evidence was clearly insufficient. The court said: "Evidence as to character has been given here — evidence as to the bad reputation of the deceased for peace and quiet has been given to you, and evidence of his good reputation for peace and quiet has been given to you. Evidence of the good reputation of the defendant for peace and quiet has been given, and evidence of his bad reputation for peace and quiet has been given. You are the judges of the value of this testimony. You can attach to it whatever importance you think proper. You may take the

evidence of the good character of the defendant in connection with all the other circumstances and facts in the case. You may also consider the evidence of his bad character."

The court in the main charge had failed to instruct the jury upon the law relating to the different degrees of manslaughter. The jury were subsequently brought back into court and instructed on this subject, and thereupon the court further charged on the question of character evidence, as follows: "While I have charged you on the question of character in, as I thought, an exhausted way, sufficient for this case, I will now recall to your attention that question. You have heard the testimony for and against the character of this defendant. You can take it all into consideration. You can give to the whole testimony, or to any part of it, such credence as you think proper. The whole question is one for your consideration. You may take into consideration all the facts and circumstances in the case. Good character of itself may sometimes create a reasonable doubt where otherwise it would not exist; but whether it does here is a question for you to determine. The whole question of fact is for your determination."

It will be observed that in these instructions the court did not inform the jury that the evidence of good character might be considered in determining the truthfulness of the testimony indicating the defendant's guilt. That is its only importance, and yet the average juryman might not so understand it. Courts have had some difficulty in comprehending and applying character evidence in these cases with the result that many convictions have been reversed. The jury have not the pardoning power nor do they impose the sentence. The ordinary layman, if he reflected, would know that; but he might think, as many judges have thought, that evidence of good character was only valuable in doubtful cases, and he might not understand that he was at liberty to disbelieve the testimony of the People's witnesses on account of the fact that the defendant's character and reputation were such that it was improbable that he would commit the crime charged. If the jury had been so instructed they would have been better able to understand the value of the evidence of previous good character. The Court of Appeals in *Remsen* v. *People* (43 N. Y. 8) said: "There is no case

in which the jury may not, in the exercise of a sound judgment, give a prisoner the benefit of a previous good character. No matter how conclusive the other testimony may appear to be, the character of the accused may be such as to create a doubt in the minds of the jury, and lead them to believe, in view of the improbabilities that a person of such character would be guilty of the offence charged, that the other evidence in the case is false or the witnesses mistaken. An individual accused of crime is entitled to have it left to the jury * * * whether he, if his character was previously unblemished, has or has not committed the particular crime alleged against him. (2 Russ. on Crimes, 785.) The weight of the evidence is for the jury alone to determine (3 Greenl. on Ev. § 25)."

It was, we think, error to refuse this request. The errors already pointed out require that the defendant should have a new trial. It is, therefore, unnecessary to decide whether any of the other alleged errors urged upon the appeal, or the conduct of the court, of which the defendant complains, was so prejudicial to his right as to require a reversal.

The judgment and order should be reversed and a new trial granted.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and HATCH, JJ., concurred.

Judgment and order reversed and new trial granted.

THE CITY OF NEW YORK, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Negligence — collision between a street car and a hook and ladder truck — proper charge in an action brought by the city to recover damages for injury to the truck — miscalculation by both the driver of the truck and the motorman — right of way given by law to the truck — care required of the motorman — his failure to use the most efficient remedy in an emergency — duty of the driver of the truck — at what rate of speed the car should be run.

In an action brought by the city of New York against a street railway company to recover damages for injuries done to a hook and ladder truck owned by the city, which, while on its way to a fire, was struck by one of the defendant's street cars, the court may properly refuse to charge the jury that if the driver

of the truck, upon seeing the car, calculated that he had time to cross the track in safety, the motorman was entitled to that calculation and was not required to use a higher degree of care than the driver; and that if the driver miscalculated, or both he and the motorman miscalculated, their verdict must be for the defendant, as such a charge fails to recognize the fact that the driver of the fire truck and the captain in charge thereof had a right to assume that the motorman, upon discovering the approach of the truck, would accord to the truck the right of way conferred on it by section 748 of the Greater New York charter (Laws of 1897, chap. 378, as amd. by Laws of 1900, chap. 155).

In such a case the court may also properly refuse to instruct the jury that "all that was required of the motorman at the time that he apprehended danger was to use ordinary care to bring his car to a stop," as such instruction might have misled the jury into believing that the defendant would not be responsible if the motorman used ordinary care to stop the car *at the time he apprehended* danger, even though the danger was caused by his previous negligence.

The court may also properly refuse to charge that "if at the time the motorman saw the danger he applied the reverse, acting in the belief that that was the best method of stopping the car, the defendant cannot be found guilty of negligence because the motorman did not apply the brake," as while the request was technically correct, it might, if granted, have misled the jury into believing that negligence could not be predicated on the conduct of the motorman prior to the time he discovered the danger.

In such a case the court may properly charge the jury that the driver of the truck was bound to respond to the alarm of fire with the greatest practicable speed, and was only bound to drive with that care which a prudent person would exercise under like circumstances.

In the main charge the court instructed the jury that "the safety of property and the protection of life may, and often do, depend upon celerity of movement, and require that the greatest practicable speed should be permitted to the vehicles of the Fire Department in responding to alarms, and the laws and ordinances restricting the speed of vehicles on the streets and avenues of the city do not apply to vehicles of the Fire Department, but do apply to the speed of defendants' car."

At the close of the charge the defendant excepted to this portion thereof, and requested the court to instruct the jury that there was no statute limiting the rate of speed of the defendant's cars and that negligence could not be predicated on the mere fact that the car was running at a high rate of speed, as the only duty resting on the defendant was, "under all the circumstances, to exercise reasonable care in the operation of the car." To this the court responded, "Taking it altogether I think that is correct. The latter part of your request modifies the balance of that very much. I will charge it as you ask."

Held, that the court in so doing committed no error.

HATCH, J., dissented in part.

APPEAL by the defendant, the Metropolitan Street Railway Company, from a judgment of the Supreme Court in favor of the

plaintiff, entered in the office of the clerk of the county of New York on the 27th day of March, 1902, upon the verdict of a jury for $971, and also from an order entered in said clerk's office on the 11th day of April, 1902, denying the defendant's motion for a new trial made upon the minutes.

Bayard H. Ames, for the appellant.

Theodore Connoly, for the respondent.

LAUGHLIN, J.:

The action is brought to recover damages to a hook and ladder truck, owned by the plaintiff, sustained by a collision with a street car, alleged to have been caused by the negligence of the defendant in the operation of the car. The facts concerning the collision are not materially different from those shown in the case of *Geary* v. *Met. St. Ry. Co.*, and they were stated and reviewed by this court on two appeals in that action. (*Geary* v. *Met. St. Ry. Co.*, 73 App. Div. 441; 84 id. 514.) That was a statutory action to recover for the death of a fireman who was riding on this truck, which was responding to an alarm of fire. The only difference in principle between that case and this is that there the deceased fireman was not in charge of the truck or driving, and we held that any negligence on the part of the driver could not be imputed to him and would not prevent a recovery. We have again reviewed the evidence and are of opinion that the question as to whether the driver or captain in charge of the truck was guilty of contributory negligence was one of fact for the consideration of the jury, and that the verdict in that regard in favor of the plaintiff is fairly sustained by the evidence.

Counsel for the defendant requested the court to instruct the jury in effect that if the driver of the truck, upon seeing the car, calculated that he had time to cross the track in safety, the motorman was entitled to that calculation and was not required to use a higher degree of care than the driver; and if the driver miscalculated, or both he and the motorman miscalculated, their verdict must be for the defendant. This request was declined and the defendant excepted. The exception presents no error. As was stated in our opinion on the last appeal in the *Geary Case* (*supra*), section 748

of the Greater New York charter (Laws of 1897, chap. 378), as amended by chapter 155 of the Laws of 1900, gave the plaintiff's firemen and apparatus, when on duty proceeding to a fire, the right of way in the public streets over all other vehicles except those carrying the United States mail. This statute gives the fire department on such occasion the right of way as against the defendant's cars. The driver of the fire truck and the captain in charge had a right to assume that the defendant's motorman upon discovering the approach of the truck, in time so to do, would accord to it this right of way. This difference between the rights of the respective vehicles is not recognized by the request and, therefore, it was properly refused.

Counsel for the defendant also requested the court to instruct the jury that "all that was required of the motorman at the time that he apprehended danger was to use ordinary care to bring his car to a stop." This request was also refused and defendant excepted. We think it was properly refused. If granted it might have misled the jury into believing that the defendant was not responsible if the motorman used ordinary care to stop the car *at the time he apprehended danger*, even though the danger was caused by his previous negligence. Moreover the request was technically incorrect in that the ordinary care to which it relates was *at the time* the motorman apprehended danger. This would be insufficient. He was required to use ordinary care from that time on until the collision actually occurred.

Counsel for the defendant also excepted to the refusal of the court to instruct the jury that "if at the time that the motorman saw the danger he applied the reverse, acting in the belief that that was the best method of stopping the car, the defendant cannot be found guilty of negligence because the motorman did not apply the brake." This request was technically correct; but if granted it might have misled the jury. While the defendant would not be liable for an error of judgment on the part of the motorman with reference to the best method of stopping the car when the danger of collision was imminent, yet the defendant might well be liable on the evidence before us for negligence on the part of the motorman prior to the time he discovered or saw the danger. The evidence on which the plaintiff bases its claim of negligence on the part of the defendant

is not so much that the motorman did not do the right thing to prevent the collision when it was imminent, as in his previous conduct in approaching the crossing at a high rate of speed without having his car under control so as to be able to stop it quickly, and without keeping a proper lookout to discover the approach of the truck or signals thereof.

In the main charge the court instructed the jury that "the safety of property and the protection of life may, and often do, depend upon celerity of movement, and require that the greatest practicable speed should be permitted to the vehicles of the Fire Department in responding to alarms, and the laws and ordinances restricting the speed of vehicles on the streets and avenues of the city do not apply to vehicles of the Fire Department, but do apply to the speed of defendants' car." At the close of the charge counsel for defendant excepted to this charge, and requested the court to instruct the jury that there was no statute limiting the rate of speed of the defendant's cars and that negligence could not be predicated on the mere fact that the car was running at a high rate of speed, as the only duty resting on the defendant was, "under all the circumstances, to exercise reasonable care in the operation of the car." To this the court responded, "Taking it altogether I think that is correct. The latter part of your request modifies the balance of that very much. I will charge it as you ask." As thus modified, we think there was no error in the charge.

The court also instructed the jury that the driver of the truck was bound to respond to the alarm of fire with the greatest practicable speed and was only bound to drive with that care which a prudent person would exercise under like circumstances, and counsel for defendant excepted. This charge was evidently taken from the opinion of the Court of Appeals in *Farley* v. *Mayor* (152 N. Y. 222). It is manifest that this is the duty of those in charge of the fire apparatus in responding to an alarm of fire where the safety of life and property necessarily depends upon the prompt arrival of the firemen and apparatus for extinguishing fires; and it was contemplated by the Legislature when it gave them the right of way over other vehicles in the public streets on such occasions. The other exceptions to which attention has been drawn have been examined but they require no special consideration here.

It follows that the judgment and order should be affirmed, with costs.

VAN BRUNT, P. J., PATTERSON and INGRAHAM, JJ., concurred; HATCH, J., dissented.

HATCH, J. (dissenting):

I am of opinion that the defendant was entitled to a charge to the jury of the matter embraced in its second and third requests. They contained correct expositions of the law, were applicable to the facts in the case and had not been embraced within the general charge delivered by the court. As they were correct statements of the law, as applicable to the facts appearing in the case, I am not able to see how they can be regarded as misleading.

For this reason I am constrained to dissent from the doctrine announced in the prevailing opinion upon such subject.

Judgment and order affirmed, with costs.

FREDERICA M. POILLON, Respondent, v. JOHN J. H. POILLON and LIBERTY REALTY COMPANY, Appellants.

Dower — foreclosure of a mortgage on land of which the husband is seized, by a corporation organized for that purpose, the stock of which the husband afterwards acquires — purchase of the land by the corporation at the mortgage foreclosure sale — the wife is concluded by the mortgage foreclosure decree.

In an action brought by Frederica M. Poillon against her husband, John J. H. Poillon, and the Liberty Realty Company to obtain an adjudication that the plaintiff had an inchoate right of dower in certain real property, the record title of which was in the Liberty Realty Company, it appeared that the said John J. H. Poillon purchased the premises April 11, 1898, subject to a mortgage which he did not assume or agree to pay; that on May 1, 1898, Mr. and Mrs. Poillon separated and have since lived apart; that the husband, deeming it unwise to make further real estate investments in his own name, consulted attorneys, with the result that the Liberty Realty Company was organized.

Subsequently the realty company purchased the mortgage on the premises in question and brought an action to foreclose the mortgage, making Mr. and Mrs. Poillon parties defendant. The action resulted in a judgment of foreclosure and sale, pursuant to which the realty company purchased the prem-

ises for less than the amount of the judgment. The realty company did not intend to purchase the property provided it sold for enough to pay the mortgage.

Mrs. Poillon alleged neither fraud nor mistake with respect to her withdrawal from the foreclosure suit, nor did she ask to have the foreclosure judgment either vacated or opened, nor show that she was not aware of all the facts at the time of the foreclosure action.

At the time the corporation was organized, Mr. Poillon did not become a director, stockholder or officer thereof. All of such stockholders, officers and directors were, however, connected with the office of Mr. Poillon's attorneys, and Poillon advanced the cash with which to pay the stock subscriptions.

Subsequent to the sale of the premises to the Liberty Realty Company, Poillon acquired the record title to 998 shares out of the 1,000 shares which constituted the capital stock of the Liberty Realty Company, the remaining 2 shares being held by other parties, who did not pay any consideration therefor, as a matter of favor to Mr. Poillon.

Held, that, proceeding upon the assumption that the defendant Poillon was the owner of all the capital stock of the corporation, and ignoring the fact that the rights of creditors of the corporation had intervened, seizin in the corporation was not a seizin in the defendant Poillon to which the inchoate right of dower would attach;

That there must be actual seizin in the defendant Poillon to entitle the plaintiff to dower;

That if the plaintiff's theory was that the husband procured the purchase of the mortgage by the realty company, with the fraudulent intent of having the same foreclosed and cutting off her right of dower and concealing from her knowledge of the fact that he was the owner of substantially all the capital stock of the corporation, she should have presented that defense in the foreclosure action;

That if she was not aware of the facts at the time of the foreclosure, her remedy would be by a motion to open the judgment of foreclosure or to bring an action to set it aside;

That while the judgment of foreclosure remained standing, the plaintiff could not maintain her action on the theory that the purchase of the mortgage by the realty company was in fact a purchase by her husband, and that consequently the mortgage merged in her husband's title, thus leaving no mortgage to be foreclosed, as the decree in the foreclosure action adjudged that the mortgage had been assigned to and was owned by the realty company.

PATTERSON and O'BRIEN, JJ., dissented.

APPEAL by the defendants, John J. H. Poillon and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 15th day of May, 1903, upon the decision of the court rendered after a trial at the New York Special Term.

Eugene Frayer, for the appellants.

Robert B. Honeyman, for the respondent.

LAUGHLIN, J.:

This is a suit in equity to have it adjudicated that the plaintiff has an inchoate right of dower in certain real property situated in the county of New York, the record title to which is in the Liberty Realty Company. The plaintiff is the wife of the appellant Poillon. He purchased and obtained a conveyance of the premises in question on the 11th day of April, 1898, subject to a mortgage thereon for $27,000 which had been given by his grantor, but he did not assume or agree to pay the mortgage. Difficulties arose between the plaintiff and her husband and they executed a separation agreement on the 1st day of May, 1898, and thereafter lived separate and apart. At this time the husband owned considerable real estate and encountered difficulty in obtaining the execution by the plaintiff of papers concerning the transfer of the same. She exacted what he regarded as an unreasonable sum of money as a condition of joining in a conveyance of a particular tract of land, and the facts tend to support his opinion in that regard. In these circumstances he deemed it unwise to invest further in real estate in his own name. He consulted attorneys with the result that at his suggestion they organized and incorporated the appellant company on the 28th day of February or 1st day of March, 1899, the incorporators being two clerks in the office of his attorneys and another who was or had been connected with their office. The capital stock was 1,000 shares of the par value of ten dollars each. One of the subscribers subscribed for 990 shares and each of the others for 5 shares. The subscribers were designated in the certificate as the directors for the first year. On the 1st day of May, 1899, 993 shares of the capital stock were issued, but none of these was issued to the plaintiff's husband. One of the original certificates was issued to Henry White, one of the appellant Poillon's attorneys, for 990 shares; and on the same day it was assigned by an indorsement on the certificate to the appellant Poillon, but the assignment was not delivered until the 20th day of December, 1900, on which day this certificate was surrendered together with two other shares which had also been

assigned to him and a new certificate was issued to him for 998 shares. Prior to that time he was not a stockholder, director or officer of the corporation. At this time the two remaining shares were surrendered up and two new certificates, each for one share, were assigned to John E. Poillon and Samuel M. Johnson respectively, at the request of appellant Poillon, and it appears that they held them as matter of favor to him without paying any consideration therefor. Upon the incorporation of the company Poillon advanced cash to pay the stock subscriptions and he thereafter further advanced large sums to the company.

The mortgage subject to which the appellant Poillon took title was assigned to his attorney by an assignment dated the 15th day of May, 1899, and by the latter assigned to the appellant company on the fifth day of June thereafter. The consideration for the assignments was paid by a check of the realty company dated the twenty-seventh day of May to the order of the attorney, who indorsed it to the attorney representing the mortgagee and it was paid on the 5th day of June, 1899. On the fifteenth of the same month the realty company commenced an action to foreclose the mortgage, making the plaintiff and her husband parties defendant. She appeared and served an answer putting in issue, among other things, the allegations as to the purchase and ownership of the mortgage by the realty company. She subsequently withdrew her answer upon the stipulation by the attorneys for the plaintiff that they would not ask for costs against her. Judgment of foreclosure and sale was thereafter duly entered in the action on the 5th day of October, 1899, foreclosing the plaintiff and her husband of all right, title and interest and equity of redemption in the property and containing the usual provision that any party to the action would be at liberty to purchase. At the sale, which took place on the 27th day of October, 1899, the premises were purchased by the realty company for less than the amount of the judgment. It appears that the company had no intention of purchasing the property at the time foreclosure action was commenced, provided it sold for enough to pay the mortgage, and its attorney who bid in the property was authorized to bid only a little more than sufficient to cover the mortgage. The company obtained the referee's deed on the 2d day of November, 1899. This action was commenced on the 5th day of October, 1901. The plaintiff alleges neither fraud

nor mistake with respect to her withdrawal from the foreclosure action, nor does she ask to have the foreclosure judgment either vacated or opened up. The plaintiff does not show that she was not aware of all the facts at the time she withdrew from the foreclosure action. The proceedings in the foreclosure action, including the judgment, therefore, so far as this action is concerned, must be given force and effect unless they may be disregarded upon the theory that they are null and void.

So far as the plaintiff's claim to dower rests upon the purchase of the premises by the realty company at the foreclosure sale, regardless of the former ownership by her husband, it is clear that it is untenable. If we could disregard the fact that the legal title to two shares of the corporate stock is in others, and go upon the assumption that the appellant Poillon is the owner of all the capital stock of the corporation, and ignore the further fact that rights of creditors of the corporation have intervened, although their claims are not liens upon the land, still seizin of the title in the corporation is not seizin in him to which the inchoate right of dower could attach. The principle of law is well settled that there must be actual seizin in the husband to entitle the wife to dower. (*Phelps* v. *Phelps*, 143 N. Y. 197; *Nichols* v. *Park*, 78 App. Div. 95.)

If the plaintiff's theory be that her husband procured the purchase of the mortgage by the realty company, with the fraudulent intent of having the same foreclosed and cutting off her right of dower, and concealing from her knowledge of the fact that he was the owner of substantially all the capital stock of the corporation, that should have been presented as a defense to the foreclosure action and its sufficiency as a defense could then have been determined. If she was not aware of the facts at the time of the foreclosure her remedy would be by a motion to open the judgment and allow her to defend. If the judgment itself was procured by fraud she might have it set aside upon clear and satisfactory proof of the facts constituting the fraud; but, as has been seen, she has prayed for no such relief in this action.

If the plaintiff's theory be that her husband was once seized of these premises and that he never has been disseized, still we think she cannot succeed because that would require us to ignore the judgment of foreclosure or treat it as a nullity. With that judg-

ment standing we think she cannot successfully maintain that the purchase of the mortgage by the realty company was in fact a purchase by her husband and that, therefore, it merged in his title and there was no mortgage that could be foreclosed and, consequently, that there has never been a disseizin. The complaint in foreclosure alleged that the mortgage had been assigned to and was owned by the realty company and the decree so adjudges. The plaintiff was a party and voluntarily withdrew from the action. The judgment, of course, is as binding upon her as if she remained in to the end. Any claim that she may now make that the realty company did not own the mortgage is inconsistent with the fact adjudicated in that action.

The learned counsel for the plaintiff relies principally upon the cases of *Munroe* v. *Crouse* (59 Hun, 248) and *Howe* v. *Learey* (62 id. 240). In the former the defendants Crouse and Everson purchased premises subject to an inchoate right of dower and subject also to a mortgage which they assumed and agreed to pay. They thereby became the primary debtors of the mortgage debt and held the premises as trustees for the owner of the inchoate right of dower. They failed to pay the mortgage debt and suffered a foreclosure for the purpose of barring the dower right and then became the purchasers at the foreclosure sale. It was held that, upon the dower becoming choate, a direct action would lie for the admeasurement thereof. This decision was evidently reached by an application of the principle that a trustee cannot bid at his own sale and that, therefore, they being the purchasers, the right of dower was not cut off by the judgment. In the latter case the husband acquired premises subject to an outstanding mortgage which was transferred to a friend of his who instituted an action of foreclosure. The wife before answer applied for the examination of the plaintiff and her husband, claiming that the mortgage was in fact paid by her husband, but that the plaintiff and her husband had conspired to assert its validity for the purpose of cutting off her dower. The court merely held that this constituted a defense and justified the order for the examination. The distinction between that case and this is that there the wife was asserting her defense in the foreclosure action, and it also appeared there that the husband, subsequent to his purchase, had given a bond for the payment of the mortgage debt.

It follows that the judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

VAN BRUNT, P. J., and McLAUGHLIN, J., concurred; PATTERSON and O'BRIEN, JJ., dissented.

O'BRIEN, J. (dissenting):

I dissent, thinking the case was properly disposed of at the Special Term, and for the reasons stated in the opinion in 37 Miscellaneous Reports, 729.

Judgment reversed and new trial granted, with costs to appellant to abide event.

TOMPKINS McILVAINE, as Sole Surviving Partner of the Copartnership of TOWNSEND & McILVAINE, Respondent, v. GEORGE STEINSON, Appellant, Impleaded with the BOARD OF EDUCATION OF THE CITY OF NEW YORK and Others, Respondents, and WILLIAM J. O'BRIEN, as Sheriff of the County of New York, Defendant.

Notice of appeal — absence of a statement of an intent to review an intermediate order — position of a respondent on whom no proposed case has been served — costs belong to the client — an agreement to pay attorneys "thirty (30) per centum of whatever amount they may collect," construed.

In the absence of a statement, in a notice of appeal from a judgment rendered in an action in equity, that the appellant intends to bring up for review an order denying his motion for a jury trial of the issues of fact arising in the action, the Appellate Division cannot review such order.

With respect to a respondent upon whom the case and exceptions have not been served, an appeal to the Appellate Division, from a judgment rendered after a trial at Special Term, brings up for review only the judgment roll.

As between an attorney and his client as well as between the client and third parties, a judgment for costs, whether the costs consist of those items taxable as of course or of an extra allowance as well, belong to the client, and the attorney merely has a lien thereon for the agreed or reasonable compensation for his services.

George Steinson, who had been wrongfully removed from his position as first assistant teacher in a public school of the city of New York, employed a firm of attorneys to bring an action against the board of education to recover his arrears of salary, giving the attorneys the following written retainer: "I, George Steinson, hereby retained Townsend & McIlvaine to collect damages for my dismissal from my position as First Assistant Teacher in the Public

Schools of the City of New York and for my loss of salary as such teacher; and I hereby agree to pay said Townsend & McIlvaine for their professional services thirty (30) per centum of whatever amount they may so collect for me and in addition the disbursements already incurred or to be incurred by them for me."

A judgment was rendered in favor of Steinson for the amount of the arrears of salary together with costs and an extra allowance of $500.

After the rendition of the judgment, the attorneys, without further authority from Steinson, commenced another action for the recovery of salary which accrued subsequent to the commencement of the first action. Steinson having objected to the bringing of this action on the ground that he had not authorized it, the attorneys discontinued it without costs. Thereafter the board of education, without suit, paid Steinson the sum of $5,183.40 on account of salary accruing subsequent to the commencement of the first action.

Held, that the contract of retainer should be construed strictly against the attorneys;

That, under the retainer, the attorneys were entitled to thirty per cent of the entire amount of the judgment rendered in the first action, and were not entitled to thirty per cent of the amount awarded as damages in that action together with the entire amount of the costs and extra allowance;

That the attorneys, having acquiesced in their client's claim that they were not authorized to sue for the recovery of the salary accruing subsequent to the commencement of the first action, were not entitled, under their retainer, to thirty per cent of the amount which the board of education had paid to Steinson without suit.

APPEAL by the defendant, George Steinson, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 13th day of June, 1902, upon the decision of the court rendered after a trial at the New York Special Term.

George Steinson, appellant, in person.

Einar Chrystie, for the plaintiff, respondent.

Albert C. Aubery, for the respondent Hart.

Terence Farley, for the respondents Board of Education and others.

LAUGHLIN, J.:

On the 1st day of April, 1901, the appellant recovered a judgment against the board of education of the city of New York for arrears of salary as first assistant teacher in the public schools, from which position he had been wrongfully removed. Messrs. Town-

send & McIlvaine were the attorneys for Steinson in that action; and the plaintiff brings this action as sole surviving partner to recover part of the judgment on an equitable assignment of a portion of the recovery given in consideration of the professional services rendered and to be rendered by his firm. The trial court has awarded judgment for plaintiff for the entire amount claimed.

The answer of the appellant put in issue the material allegations of the complaint and set up a counterclaim for damages sustained through the unskillfulness and negligence of his attorneys.

The first assignment of error by the appellant is a denial of a jury trial of the issues of fact. He moved for a settlement of issues of fact to be tried by a jury. The motion was denied and he appealed to this court from the order denying it; but the appeal was dismissed for neglect to prosecute the same. He obtained no stay of proceedings pending the appeal and in the meantime the case was moved for trial. At the opening of the trial he asked for an adjournment pending his appeal from the order. This motion was denied and he excepted. In the notice of appeal from the judgment he did not give notice that he intended to bring up for review the order denying his motion for a jury trial and, therefore, we cannot review the order. (Code Civ. Proc. §§ 1301, 1316; *Herb* v. *Metropolitan Hospital*, 80 App. Div. 145.)

The trial court found that the attorneys for the appellant were acting under a retainer which entitled them to thirty per cent of the amount collected. The appellant contends that this finding is not supported by the evidence and is against the weight of the evidence. It appears that in the year 1896 the appellant, through other attorneys, instituted a mandamus proceeding to procure his reinstatement and to require the payment of his salary and also commenced an action against the board of education to recover the arrears of salary. His motion for a mandamus had been denied and he had taken an appeal from the order denying it. On the 15th day of December, 1897, while this appeal was pending, and no steps had been taken in the action subsequent to the service of the summons, he gave Messrs. Townsend & McIlvaine a retainer in writing as his attorneys "to take all necessary steps to procure" his reinstatement and the payment of the arrears of salary; and he agreed to pay them fifteen per cent of any and all amounts recovered and also to pay

"from time to time all necessary disbursements as they arise." Prior to the decision of the Court of Appeals in the mandamus proceeding it occurred to his attorneys that they might be able to procure his reinstatement without being able to collect the arrears of salary; and on the 4th day of March, 1898, he promised in writing, in that event, to pay them reasonable compensation for the services rendered. The undisputed evidence shows that the appellant did not pay all necessary disbursements from time to time as they arose and that the attorneys were obliged to and did advance their own funds therefor for which they had not been reimbursed. The Court of Appeals affirmed the decision of the lower court denying the application for reinstatement. In the meantime the complaint in the action for salary had been served and issue was joined therein on the 25th day of January, 1899, and the case was placed upon the calendar and set to be called for trial on the 24th day of May, 1899. On the 29th day of March, 1899, the appellant gave his attorneys another retainer in writing as follows:

"I, George Steinson, hereby retained Townsend & McIlvaine to collect damages for my dismissal from my position as First Assistant Teacher in the Public Schools of the City of New York and for my loss of salary as such teacher; and I hereby agree to pay said Townsend & McIlvaine for their professional services thirty (30) per centum of whatever amount they may so collect for me and in addition the disbursements already incurred or to be incurred by them for me.

"Dated, *March* 29, 1899. GEORGE STEINSON."

The plaintiff claims that the compensation of the attorneys is to be determined by this retainer and the appellant contends that it depends on the first retainer. Parol evidence was given by both parties without objection concerning the object and application of the last retainer. The appellant testified, in substance, that it was intended to apply to actions that might be thereafter brought against the individual members of the board of education for his wrongful discharge; but this is controverted by the testimony of McIlvaine whose testimony is to the effect that this retainer was the result of negotiations between the parties with reference to the pending action for salary. Correspondence between the parties

leading up to the giving of this retainer was also introduced in evidence which, as we construe it, related to the compensation to be received by the attorneys for the trial of the action to recover salary and for the subsequent proceedings therein. On the 23d day of May, 1899, the attorneys, at the request of the appellant, according to the testimony of McIlvaine, which is not controverted, accepted this retainer. The case was tried before the court without a jury and decision reserved. Pending the decision the appellant attempted to dismiss his attorneys. After the decision, which was adverse to the appellant, his attorneys notified him in writing that as he did not wish them to continue to act as his attorneys they would take no further steps in the case unless he notified them in writing that he wished them to continue to act under their retainer and assured them that he would leave the full control of the case in their hands. The appellant replied to this letter, acquiescing in their determination not to act further and notifying them that he had procured other counsel. Subsequently the appellant, after further negotiations with his attorneys, formally withdrew his revocation of their retainer and authorized them to take up his case again upon "the original terms" of his retainer and agreed to give them the full control that is usually given to attorneys and promised not to interfere between them and the court or the corporation counsel. They then resumed charge of the case. They appealed to the Appellate Division, where the judgment was reversed and a new trial granted; and from this judgment the city appealed, giving a stipulation for judgment absolute. The Court of Appeals affirmed the reversal. The Special Term awarded judgment on the remittitur for the amount of the arrears of salary and costs. The city then appealed on the ground that there should have been an assessment of damages, but the Appellate Division affirmed and this ended the litigation.

The appellant also contends that the revocation of the discharge of his attorneys and authority to them to resume charge of the case "upon the original terms" of his retainer had reference to the first retainer fixing the compensation at fifteen per cent. In view of the fact that there had been two retainers relating to this action, the appellant's letter authorizing his attorneys to resume charge of the case was ambiguous, and parol evidence was properly received to

identify the retainer to which it related. McIlvaine testified in effect that at the interview between him and the appellant preceding the writing of this letter, and at which they came to an understanding that the letter was to be written, he suggested that the fee for the services of the attorneys should be increased from thirty per cent, but the appellant objected to an increase and expressed a willingness to let it remain at thirty per cent and he acquiesced. As already stated, we are of opinion that at the time of the attempted discharge of the attorneys they were, by mutual consent of the parties, acting under the retainer of March 29, 1899. We deem it unnecessary to decide whether this retainer differed from the first in any respect other than as to the compensation of the attorneys and if not whether the attorneys were at liberty to exact or justified in exacting increased compensation so that there was a valid consideration for the new retainer, because, in any event, the attorneys and client having agreed to sever their relations the former were at liberty to require, as a condition of their resuming charge of the case, an agreement that they were to act under the thirty per cent retainer as was done.

The trial court has allowed the plaintiff the entire amount of the costs taxed in the action to recover salary including an extra allowance of $500 therein and thirty per cent of the balance of the recovery. The appellant contends that the plaintiff was only entitled to the stipulated percentage of the recovery on account of salary exclusive of costs. As between an attorney and his client, as well as between the client and third parties, a judgment for costs, whether the costs consist of those items taxable as of course, or of an extra allowance as well, belong to the client; and the attorney merely has a lien thereon for the agreed or reasonable compensation for his services. (*Starin* v. *Mayor, etc.*, 106 N. Y. 82; *Gallup* v. *Perue*, 10 Hun, 525; *Wheaton* v. *Newcombe*, 48 N. Y. Super. Ct. 215; *Matter of Jackson* v. *Stone*, 48 App. Div. 628; *Barry* v. *Third Ave. R. R. Co.*, 87 id. 543.) Of course it is competent for the client to stipulate that the attorney shall have the costs in addition to other compensation; but neither in the retainer of March 29, 1899, nor in the acceptance thereof do we find any agreement to that effect. The contract as to compensation is that the client is to pay the attorneys "thirty (30) per centum of what-

ever amount they may so collect for me." According to the testimony of appellant, which is not disputed, this retainer was dictated by McIlvaine. In view of this fact and of the relation of attorneys and client, it should be construed strictly against the attorneys. There is, therefore, much ground for contending that the percentage should be limited to that part of the recovery which relates to the salary or damages. It, however, specifies a percentage of the *amount collected* by the attorneys for the client, and, although the costs belong to the client, still the extra allowance is obtained through an application made to the court by the attorneys in his behalf, and the whole is collected for him by the attorneys. While I deem it clear, therefore, that the costs were erroneously awarded in gross to the attorneys, yet I am of opinion that the fair construction of the retainer is that the attorneys were entitled to thirty per cent of the entire recovery.

After the decision of the Court of Appeals in the action for salary another action was commenced by the attorneys, without further authority from the client, for the recovery of salary amounting to $5,000, which accrued subsequent to the date of the commencement of the first action. The appellant, on learning that this action was brought, objected, contending that he had not authorized it. Subsequently the attorneys, at his instigation, discontinued it, without costs. Thereafter the board of education, without suit, paid the appellant the sum of $5,133.40 on account of salary accruing subsequent to the commencement of the first action. The trial court has also allowed a recovery of thirty per cent of this amount. We think this was error. Although the board of education, in voluntarily making the payment, was doubtless influenced by the decision of the Court of Appeals, and probably there would have been no defense to its recovery, yet it cannot be said that it was recovered by the attorneys under their retainer. They acquiesced in their client's claim that they were not authorized to sue for the recovery of this salary, and discontinued the action which they had brought for that purpose. They were, therefore, not entitled to any percentage of any amount of the salary thus voluntarily paid without suit.

The respondent Hart was made a party defendant on account of his having filed a notice claiming an equitable assignment of

$500 of the judgment for services as counsel on the appeal to the Appellate Division from the judgment dismissing the complaint in the action for salary. The proposed case and exceptions have not been served upon him. The appeal, therefore, as to him only brings up the judgment roll. In the decision the learned trial justice finds that Hart was retained by appellant as counsel at an agreed compensation of $500, payable out of the recovery, and that he fully performed the services and has a lien upon the judgment to the extent of $500 and interest from the 1st day of April, 1901, and has an equitable assignment of the judgment to that extent. The judgment follows the decision in this regard. There is, therefore, no merit in the appeal from Hart's recovery.

The court dismissed the appellant's counterclaim upon the merits, and he contends that this was error. The dismissal was upon the theory that the appellant failed to establish his counterclaim, and the decision in this regard is fairly sustained by the evidence.

The learned counsel for the city contends that recovery of interest should not be allowed as against the city. The decision authorizes and the judgment provides for the recovery of interest, and the city has not appealed. Consequently, that question is not before us. The defendant Steinson demanded no relief against the city, the board of education or the comptroller in his answer, and, therefore, he could not have obtained any greater relief against them on appeal than he was awarded in the trial court. It was, therefore, unnecessary for them to appear upon the appeal.

It follows, therefore, that the judgment should be modified by limiting the plaintiff's recovery to thirty per cent of the face of the judgment in the action for the recovery of appellant's salary and interest thereon, and as so modified affirmed, with costs to respondent Hart, but without costs to the appellant or other respondents.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and HATCH, JJ., concurred.

Judgment modified by limiting plaintiff's recovery to thirty per cent of the face of the judgment in the action for the recovery of appellant's salary and interest thereon, and as so modified affirmed, with costs to respondent Hart, but without costs to the appellant or other respondents

FREDERIC L. COBB and PIERRE C. HALL, Respondents, v. DOMINGO M. MONJO, Appellant, Impleaded with SOCIETE ANNONYME DE EXPLOITATION DES BREVETS REUSE AUX ETATS UNIS, L'AMERIQUE, Defendant.

Misjoinder of parties plaintiff — two parties, each having an independent separate contract with a third person, cannot in one action sue to recover the amount due under both contracts.

Except in those cases where the interests of numerous parties are similar, and the Code of Civil Procedure permits one party to bring an action for the benefit of himself and all others similarly situated, the plaintiffs must all be interested in all the causes of action stated, and if they are not, a demurrer for misjoinder of parties plaintiff will lie.

Where the owner of a patent enters into a contract with one party by which such owner agrees that if such party shall sell the patent it will pay to him as commissions a sum equal to two-thirds of five per cent of the selling price, and such owner also enters into another contract with another party by which it agrees that if such other party shall sell the patent it will pay him as commissions a sum equal to one-third of five per cent of the selling price, the two parties thus contracted with cannot recover in a single action the full commissions due to them under both contracts.

APPEAL by the defendant, Domingo M. Monjo, from an interlocutory judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 4th day of September, 1903, upon the decision of the court, rendered after a trial at the New York Special Term, overruling said defendant's demurrer to the plaintiffs' complaint.

Pratt A. Brown, for the appellant.

Frederick Beltz, for the respondents.

LAUGHLIN, J.:

This action is brought upon two separate contracts for the payment of commissions for selling a patented machine for manufacturing cigars or rolls of tobacco. The patent was owned by the defendant, the Societe Annonyme de Exploitation des Brevets Reuse aux Etats Unis L'Amerique. The contracts were made with the appellant individually and as attorney in fact for the owner of the patents. One of the contracts was made with the plaintiff Cobb,

and the defendants agreed therein, among other things, that in the event of a sale of the patent by him to the American Tobacco Company for more than $1,500,000 they would pay him in cash as commissions a sum equal to two-thirds of five per cent of the selling price. The other contract was made with the plaintiff Hall, and the defendants agreed therein, among other things, that if he should sell the patent to said tobacco company for more than $1,500,000, they would pay him in cash as commissions a sum equal to one-third of five per cent of the selling price. It is alleged in the complaint that a sale of the patent to the tobacco company was effected by the plaintiffs at the price of $5,000,000, and they demand judgment for $250,000, being a sum equal to five per cent of the selling price, less $2,600, which it is admitted has been paid to apply on the commissions.

The demurrer is upon the grounds that the facts stated do not constitute a cause of action, and that there is a misjoinder of parties plaintiff in that two separate causes of action are alleged, one in favor of one plaintiff and the other in favor of the other, neither being interested in the other's cause of action. It is unnecessary to consider the first ground of demurrer for the second ground is unanswerable and the action cannot be maintained by the plaintiffs jointly. The contracts are in writing and are annexed to and made a part of the complaint. The contract with each plaintiff is separate and distinct; and the liability of the defendants to them upon the facts alleged is several. There is no theory upon which the action of the plaintiffs in attempting to unite their interests in a single cause of action brought by both of them can be sustained. They are not claiming the same fund, nor does the action relate to any fund. The contracts merely created an obligation in a certain event to pay a sum of money as commissions. The plaintiffs seek to recover in one action the full commissions under both contracts. Neither plaintiff has any interest in the other's contract or commissions. Either might have assigned his cause of action to the other, but that has not been done. They wish to recover a money judgment jointly in which one will have a two-thirds and the other a one-third interest. Except in those cases where the interests of numerous parties are similar and the Code permits one party to bring an action for the benefit of himself and all others similarly situated,

the plaintiffs must be all interested in the causes of action stated; and if they are not a demurrer for misjoinder of parties plaintiff will lie. This proposition is too clear to require the citation of authorities.

It follows that the interlocutory judgment should be reversed, with costs to appellant, and demurrer sustained, with costs, and final judgment on the demurrer granted dismissing the complaint, with costs.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and HATCH, JJ., concurred.

Interlocutory judgment reversed, with costs to appellant, and demurrer sustained, with costs, and final judgment on the demurrer granted dismissing complaint, with costs.

ISAAC N. ROTH, Respondent, v. JULIA ROTH, Appellant.

Action for divorce — charge as to inferences of innocence or guilt.

In an action brought to obtain an absolute divorce, evidence that the defendant committed adultery with the corespondent prior to the period covered by the issues is admissible for the purpose of showing an inclination and lascivious desire on the part of the defendant and the corespondent, from which the jury may infer that on the subsequent occasions when the parties were together during the period covered by the issues, under circumstances affording an opportunity for the gratification of such inclination and desire, it is probable that they committed adultery.

The doctrine laid down by the Court of Appeals in *Pollock* v. *Pollock* (71 N. Y. 137), to the effect that in an action for an absolute divorce based upon circumstantial evidence, if the facts and circumstances are as consistent with innocence as with guilt, or are reconcilable with innocence, the plaintiff is not entitled to recover, was not overruled by *Allen* v. *Allen* (101 N. Y. 658).

In the *Allen* case the Court of Appeals merely intended to disapprove of those expressions in the *Pollock* case, which are to the effect that the evidence must satisfy the court or jury beyond a doubt of the guilt of the defendant, and that the fact of adultery could not be found upon circumstantial evidence, unless the circumstances admit of no other possible conclusion.

In an action for an absolute divorce the court may properly decline to charge, "That if, from the facts presented there is an inference of innocence as well as of guilt, the jury are bound to answer in the negative," as the inference of guilt might be stronger than that of innocence.

The court may also properly refuse to instruct the jury that before they could find that the defendant had committed adultery, they must come to the conclusion that no other inference than guilt could be drawn from the evidence, and that while the act of adultery might be established by presumptive evidence alone "yet such evidence must lead inevitably to that fact, exclusive of every other conclusion," as such a charge would fall within the condemnation of the views expressed by the Court of Appeals in the *Allen* case.

Semble, that a direction that if the evidence was equally consistent with innocence and with guilt, or that if the evidence was reconcilable with the theory of innocence, the defendant was entitled to a verdict, would have been proper.

APPEAL by the defendant, Julia Roth, from so much of an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 10th day of December, 1902, upon the verdict of a jury, as adjudges that the plaintiff is entitled to a judgment of divorce, and that alimony shall cease from the date of the entry of such interlocutory judgment, and also from an order entered in said clerk's office on the 10th day of December, 1902, denying the defendant's motion for a new trial made upon the minutes.

Jesse S. Epstein, for the appellant.

Hugo Wintner, for the respondent.

LAUGHLIN, J.:

The evidence of defendant's adultery is ample to sustain the verdict and decision.

Two exceptions require consideration. One of the issues submitted to the jury was whether the defendant committed adultery with the co-respondent on the 3d day of July, 1901, at No. 235 Brook avenue, and another issue was as to whether she committed adultery at the same place with the corespondent between the ninth day of September and the twentieth day of December in the same year; and a third issue was, whether she had committed a similar act with the co-respondent at a cottage in Patchogue. There was satisfactory circumstantial evidence of her commission of adultery with the co-respondent at the place mentioned on the 3d day of July, 1901, but this had been condoned. There was ample evidence that she and the co-respondent had been together at the same place between the 9th day of September and the 20th day of December, 1901, and at

Patchogue at the time specified under circumstances affording an opportunity for the commission of similar acts. The court received evidence tending to show and sufficient to justify the inference that during a night shortly after the 6th of July, 1901, the co-respondent occupied a bedroom with the defendant at said No. 235 Brook avenue. This evidence was received under defendant's objection and exception that it was not within the issues and that evidence of specific acts of adultery other than those specified was inadmissible. The judgment is not predicated upon a finding of adultery upon that occasion. The evidence was received merely for the purpose of showing an inclination and lascivious desire from which the jury might infer that on the subsequent occasions when the parties were together during the period covered by the issues submitted, under circumstances affording an opportunity for the gratification of such inclination and desire, it was probable that they committed adultery. For this purpose we think the evidence was admissible.

The learned trial justice was evidently of opinion that the rule laid down by the Court of Appeals in *Pollock* v. *Pollock* (71 N. Y. 137), to the effect that in an action for divorce depending upon circumstantial evidence where the facts and circumstances are as consistent with innocence as with guilt or are reconcilable with innocence, the plaintiff is not entitled to recover, has been overruled by *Allen* v. *Allen* (101 N. Y. 658). While it would seem from the opinion in *Allen* v. *Allen* (*supra*) that the Court of Appeals did intend to modify the doctrine of *Pollock* v. *Pollock* (*supra*), yet the doctrine announced in the *Pollock* case has been frequently reaffirmed by the Court of Appeals in divorce cases and in cases involving issues of fraud. (*Conger* v. *Conger*, 82 N. Y. 603; *Lopez* v. *Campbell*, 163 id. 340.) In *Lopez* v. *Campbell* (*supra*) the Court of Appeals say: "While a material fact may be established by circumstantial evidence, still, to do so the circumstances must be such as to fairly and reasonably lead to the conclusion sought to be established, and to fairly and reasonably exclude any other hypothesis. Where the evidence is capable of an interpretation which makes it equally consistent with the absence as with the presence of a wrongful act, that meaning must be ascribed to it which accords with its absence. In other words, it can only be established by proof of such circumstances as are irreconcilable with any other

theory than that the act was done;" and cite *Morris* v. *Talcott* (96 N. Y. 100) and the *Pollock* case, among others, as authority for that proposition. The doctrine of the *Pollock* case to the effect here stated has recently been expressly approved by this court in *Poillon* v. *Poillon* (78 App. Div. 127–129). In the *Allen Case* (*supra*) we think the Court of Appeals merely intended to disapprove of those expressions in the opinion in the *Pollock* case which are to the effect that the evidence must satisfy the court or jury beyond a doubt of the guilt and that the fact of adultery could not be found upon circumstantial evidence *unless the circumstances admit of no other possible conclusion.*

At the close of the charge counsel for defendant drew the attention of the court to a request which he had submitted, but which he did not read in the presence of the jury, saying, "It is virtually what the Court says in the case of *Pollock* vs. *Pollock.*" To this the court replied, "That has been distinctly overruled by *Allen* vs. *Allen*, 101 N. Y. 658, which I just read to the jury — they overruled *Pollock* vs. *Pollock.*" Counsel for the defendant thereupon took an exception. This exception in and of itself presents no error for it does not appear just what the court declined to charge. Subsequently counsel for the defendant specifically requested the court "to direct the jury to answer the issues presented to them in the negative because the facts and circumstances proven by the plaintiff are reconcilable with the theory that the act had not been committed," and to the refusal of the court to so instruct the jury an exception was taken. No error was presented by this exception for the reason that it was a question for the jury. It could not be affirmed as matter of law that the facts and circumstances proven were reconcilable with the theory of innocence. Counsel for the defendant thereupon requested the court to charge, "that if from the facts presented there is an inference of innocence as well as of guilt, the jury are bound to answer in the negative." This the court declined, saying that the jury had already been instructed in the language of the Court of Appeals, and that the burden was clearly upon the plaintiff of showing the commission of the acts by a fair preponderance of credible evidence. Counsel for the defendant duly excepted. The refusal to instruct the jury in the language of this request presents no error. If granted, it would only have confused the minds of

the jurors. If there was in one view of the evidence an inference of guilt and in another view an inference of innocence, it does not necessarily follow that the evidence is as consistent with innocence as with guilt, or is reconcilable with the theory of innocence. The inference of guilt may be stronger than the inference of innocence. Counsel for defendant also requested the court to direct the jury, in substance, to find in favor of the defendant on the main issues submitted, on the ground that the facts testified to by the witnesses for the plaintiff were capable of the interpretation that the act of adultery had not been committed, and also on the ground that the facts and circumstances proven were reconcilable with the theory of innocence, and excepted, separately, to the court's refusal to so charge. The evidence did not warrant or require the inference of innocence as matter of law. These requests were, therefore, properly refused. Counsel for the defendant also requested the court to instruct the jury that before they could answer the issues in the affirmative they must come to the conclusion that no other inference than guilt could be drawn from the evidence, and that while the act of adultery might be established by presumptive evidence alone "yet such evidence must lead inevitably to that fact, exclusive of every other conclusion," and to the refusal of the court to so charge he duly excepted. That request, we think, fairly falls within the condemnation of the views expressed by the Court of Appeals in the *Allen* case. These requests were handed up but were not read aloud or stated in the presence of the jury. A direction that if the evidence was equally consistent with innocence and with guilt, or that if the evidence was reconcilable with the theory of innocence the defendant was entitled to a verdict would have been proper and would have aided the jury; but, as has been seen, the defendant has not fairly raised the question by request and exception. Moreover, the main charge of the court, which was able and instructive, was quite favorable to the defendant upon the law. The jury were instructed, among other things, that "the burden is upon the plaintiff from first to last in the case. He must satisfy you by a fair preponderance of credible evidence of the two propositions which I have heretofore indicated to you; *first*, that these parties had the lascivious desire; and, *second*, that they had the opportunity to gratify it; and *third*, that they did gratify it. That, however, you

may find as an inference, that is to say, you are not called upon to receive direct proof of the fact, but given the desire and intent and opportunity, you may if you are satisfied by a fair preponderance of credible evidence, if you can say it is likely and probable, and necessarily followed from the preceding circumstances that they did commit the act, you may find it, although no one saw it." We are of opinion, therefore, that these exceptions present no reversible error. The other exceptions in the case have been examined but require no special mention.

It follows, therefore, that the judgment should be affirmed.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and MCLAUGHLIN, JJ. concurred.

Judgment affirmed.

FREDERICK KLEIN, Respondent, v. EAST RIVER ELECTRIC LIGHT COMPANY (Thereafter Known by the Name of the THOMSON-HOUSTON ELECTRIC COMPANY) and the MANHATTAN ELECTRIC LIGHT COMPANY, Appellants.

Coupons detached from a mortgage bond — when they are collectible from a company which has received the assets and paid other coupons of the company issuing the bonds — competency and effect of sworn statements in an original answer where an amended complaint and an amended answer have been served in the action — competency of an attorney's letter advising their payment.

In an action brought to recover upon interest coupons, which had been detached from mortgage bonds issued by the East River Electric Light Company, it appeared that in 1892 the name of the East River Electric Light Company was changed to the Thomson-Houston Electric Light Company and that its assets were sold upon a mortgage foreclosure in December, 1894, and were subsequently purchased by the Madison Square Light Company which had been organized in December, 1894, pursuant to an agreement or plan dated December 25, 1894. In August, 1896, the Madison Square Light Company was consolidated with the Manhattan Electric Light Company.

The action was brought against the East River Electric Light Company and the Manhattan Electric Light Company. The latter company interposed an answer in which it admitted that it was the successor of the East River Electric Light Company and that it acquired the franchise and properties of the latter subject to the mortgage and the payment by it of the bonds and coupons; that as the successor of the East River Electric Light Company it was, and had been,

at all times ready and willing to pay the principal of the coupons, but was not willing to pay the interest on such coupons.

After this answer had been interposed the Manhattan Electric Light Company became merged in the Edison Electric Illuminating Company. An amended complaint was then served, to which the Edison Electric Illuminating Company served an answer on behalf of the Manhattan Electric Light Company, alleging that the coupons were void; that while the bonds were in the possession of the East River Electric Light Company the coupons became due and were detached, if at all, prior to the time when the bonds were sold or negotiated by it; that the plaintiff was not an owner or holder for value before maturity.

The plaintiff, in support of his case, offered in evidence the answer originally interposed by the Manhattan Electric Light Company, also a letter delivered to a representative of the plaintiff by the attorney for the Manhattan Electric Light Company, which read as follows:

"The bearer Mr. Baltes has five coupons of the East River Electric Light Company's bonds which seem to be all right. We advise that they be paid if there is no record that like numbers have already been paid."

It further appeared that the Manhattan Electric Light Company had paid coupons detached from the bonds of the East River Electric Light Company to the time of the commencement of this action, other than the five in suit.

Held, that the plaintiff had established a *prima facie* case by the following facts: *First*, the sworn admission in the original answer of the Manhattan Electric Light Company that it did assume the payment of the bonds and coupons issued by the East River Electric Light Company; *second*, the sworn declaration contained in the original answer of the Manhattan Electric Light Company that it was ready to pay the principal of the coupons in suit, but simply disputed its liability for interest thereon; *third*, the letter of the attorney of the company advising the payment of the coupons in suit; *fourth*, the recognized liability of the Manhattan Electric Light Company, indicated by its payment of all the coupons detached from the bonds of the East River Electric Light Company to the time of the commencement of the action, with the exception of the coupons in suit.

INGRAHAM and McLAUGHLIN, JJ., dissented.

APPEAL by the defendants, the East River Electric Light Company (thereafter known by the name of the Thomson-Houston Electric Company) and another, from an order of the Appellate Term of the Supreme Court, entered in the office of the clerk of the county of New York on the 28th day of May, 1903, affirming a judgment of the General Term of the City Court of New York, entered in the office of the clerk of said court on the 21st day of January, 1903, which affirmed a judgment of the City Court of New York in favor of the plaintiff, entered in the office of the clerk

of said court on the 19th day of May, 1902, and an order entered in said clerk's office on the 7th day of June, 1902, denying the defendants' motion for a new trial made upon the minutes.

Henry J. Hemmens, for the appellants.

David Gerber, for the respondent.

O'BRIEN, J.:

The action was brought to recover upon five interest coupons of the sum of thirty dollars each detached from bonds issued by the defendant, the East River Electric Light Company, which was organized in 1887. In 1892 its name was changed to the Thomson-Houston Electric Light Company. The assets of this company were sold upon a mortgage foreclosure in December, 1894, and subsequently purchased by the Madison Square Light Company. The latter company had been organized in December, 1894, pursuant to an agreement or plan dated September 25, 1894. In August, 1896, the Madison Square Light Company was consolidated with the Manhattan Electric Light Company, which is the company upon which the original summons and complaint herein were served. An answer was interposed by it and thereafter the Manhattan Company became merged in the Edison Electric Illuminating Company. An amended complaint was served, to which an answer was interposed for the defendant, the Manhattan Electric Light Company, "by its successor, the Edison Electric Illuminating Company." When the case was reached for trial the plaintiff moved for judgment upon the ground that the answer of the Edison Company was not an answer on behalf of the defendants named in the complaint, which motion was granted and a verdict directed for the plaintiff. From the judgment thereupon entered an appeal was taken, which resulted in a reversal, the case being sent back so that the jury could pass upon the defendant's liability. (37 Misc. Rep. 490.) Upon the new trial the jury returned a verdict for the plaintiff for the full amount ($276), and from the judgment thereupon entered the defendant appealed first to the General Term of the City Court, which affirmed the judgment of the Trial Term, and then to the Appellate Term, and from the judgment and order affirming the General Term judgment this appeal is taken.

The issue as originally presented related solely to the question of

whether or not interest should be allowed on the coupons, it being conceded, as shown not alone by the letter of the attorneys, but by the admissions contained in the original answer, that no point was made but that the defendant was liable for the principal amount represented by the coupons. It was only in the amended answer that the defense was interposed denying that the coupons were payable and averring that they were void and not issued for a valuable consideration and never became independent negotiable instruments, and that while the bonds were in the possession of the East River Company the coupons became due and were detached, if at all, by said owner prior to the time when said bonds were sold or negotiated by it, and that the plaintiff is not an owner or holder for value before maturity, and payment has never been demanded except with demand for interest.

With respect, however, to the liability of the defendant for the principal amount represented by the coupons, we have in the original answer the following significant admissions: "Defendant further answering admits that it was and is the lawful successor of the East River Electric Light Company, and that it acquired its franchises and properties subject to the said mortgage and the payment by it of the said bonds and coupons. Defendant further answering denies that it has knowledge or information sufficient to form a belief that plaintiff is the holder and owner of the coupon which was issued and attached to one of said bonds, to wit, No. 154, wherein and whereby the said East River Electric Light Company promised and agreed to pay to bearer or the holder of said coupon on the first day of September, 1888, Thirty dollars in gold coin of the United States at the office of the treasurer of the said company in the City of New York, being six months interest then due on its first mortgage bond, or that the bond therein referred to was one of the series of first mortgage bonds thereinbefore referred to. Defendant further answering denies that when the said coupon became due and payable the East River Electric Light Company or its successor companies failed and neglected to pay the same. Defendant further answering denies that the said coupon was duly presented for payment at the place therein named as the place of payment and payment thereof refused. Defendant further answering denies that the defendants have failed or refused to pay the said coupon or any part thereof. Defendant

further answering denies that the whole amount of said coupon, to wit, $30, is due and owing from the defendant to the plaintiff, with interest. Defendant further answering alleges that it, as the successor of the said East River Electric Light Company, and its said predecessor companies were, are and have been at all times ready and willing to pay the amount of said coupon to the lawful owner and holder thereof when presented; that the same never has been presented for payment or payment thereof demanded, except when accompanied with a demand for interest, which said demand has been refused, but defendants have at all times been ready and willing to pay the face of the said coupon and still are ready and willing to pay the same."

The plaintiff, therefore, alleges, as against the defendant sought to be held, that the latter acquired the franchises and property of the East River Company and assumed the payment of the bonds and coupons which were secured by a mortgage thereon; and we have in the answer the express admissions, as already pointed out, that such defendant alleges that they "were, are and have been at all times ready and willing to pay the amount of said coupon to the lawful owner and holder thereof when presented; that the same never has been presented for payment or payment thereof demanded, except when accompanied with a demand for interest, which said demand has been refused, but defendants have at all times been ready and willing to pay the face of the said coupon, and still are ready and willing to pay the same."

The plaintiff, in support of his case, offered in evidence the answer originally interposed by the Manhattan Electric Light Company, also a letter delivered to a representative of the plaintiff by the attorney for the Manhattan Electric Light Company, which read as follows:

"The bearer Mr. Baltes has five coupons of the East River Electric Light Company's bonds which seem to be all right. We advise that they be paid if there is no record that like numbers have already been paid."

It further appeared that the Manhattan Electric Light Company had paid coupons detached from the bonds of the East River Electric Light Company to the time of the commencement of this action, other than the five in suit.

We thus have, in support of the plaintiff's case, as pointed out by the respondent: "*First*, the sworn admission in the original answer of the Manhattan Company that it did assume the payment of the bonds and coupons issued by the East River Company under its mortgage to the Knickerbocker Trust Company; *second*, a sworn declaration that it was ready and willing to pay the principal of the coupons in suit, but simply objected to its liability for interest thereon; *third*, the letter of the attorneys of the Company advising the payment of these coupons; *fourth*, the recognized liability of the Manhattan Company indicated by its payment of every coupon detached from the bonds of the East River Company down to the commencement of this action, February, 1900, excepting only the five in suit."

We think that taking into consideration all these facts, there was made out a *prima facie* case, and assuming that the plaintiff has made out a *prima facie* case, there is sufficient to support the verdict of the jury, because it will be noticed that the defendant did not meet it; nor did it put in any evidence to destroy the effect of the inferences which might have been drawn from the testimony as presented by the plaintiff favorable to his contention. In other words, the defendant relied upon the weakness of the plaintiff's case rather than upon any defense which it attempted to support by evidence.

This is significant, because with respect to the question of whether the Manhattan Company did or did not assume the payment of these coupons we have the allegation by the plaintiff to that effect, and though it was made to appear that an agreement or plan of organization was entered into in September, 1894, in pursuance of which the Madison Square Light Company was to be incorporated and to acquire the assets of the Thomson-Houston Electric Light Company (the successor of the East River Electric Company) and did thereafter acquire them, and that the Madison Square Light Company was subsequently consolidated with the defendant the Manhattan Electric Company, the latter company studiously avoided producing upon the trial such agreement. It is fair to assume that if produced it would not have been unfavorable to the plaintiff's contention, that there was in its provisions an express assumption of

the debts of the prior company, which upon the foreclosure was brought to a termination. It is true that there were introduced upon the trial the articles of incorporation of the Madison Square Light Company, and that therein it is stated that pursuant to the agreement of September 25, 1894, it was planned to organize such company and purchase the assets sold under the foreclosure sale of the Thomson-Houston Company and issue stock for various purposes, and such purposes as set forth do not include payment or asssumption of any debts or obligations of the East River Company, secured or unsecured. These articles do not, however, stand in the place of the agreement and are not conclusive as to its terms and hence are not controlling. It was entirely proper for the new company to have assumed the indebtedness in its plan of organization. By section 3 of the Stock Corporation Law (Laws of 1892, chap. 688) provision is made for the reorganization of a corporation upon a sale of its corporate property and franchises by virtue of a mortgage or deed of trust; and section 4 provides that the purchasers, at or previous to the sale, may arrange a plan of reorganization for the readjustment of the respective interests of creditors, mortgagees and stockholders. Just what terms, if any, were made for the assumption of outstanding debts and obligations, the agreement or plan of organization would have shown, but, as stated, the defendant failed to produce this upon the trial. Apart, however, from such agreement and the inferences to be drawn from its absence, we think that the plaintiff made out a *prima facie* case sufficient to support the verdict.

It follows that the determination appealed from should be affirmed, with costs.

VAN BRUNT, P. J., and HATCH, J., concurred; INGRAHAM and McLAUGHLIN, JJ., dissented.

INGRAHAM, J. (dissenting):

I do not concur in the affirmance of this judgment. The coupons in question had been detached from the bonds before delivery; and after they were detached and before September twelfth, when they became due, they were delivered to Wm. H. Kelly for value.

As they were thus detached from the bonds before delivery by the obligor, they never represented interest on the bonds and were

not, therefore, secured by the mortgage which secured the payment of the bonds and interest. When issued for value by the obligor, however, they became, in the hands of a holder for value, obligations of the company, and if not paid could be enforced by the usual methods.

The defendant, the Manhattan Company, having acquired the property of the East River Company subject to the first mortgage, while under no legal obligation to pay the bonds and coupons representing interest thereupon, was compelled to pay them to avoid a foreclosure of the mortgage which secured these bonds and interest. The coupons in question, however, having been detached before the bonds were issued, had no relation to the bonds, did not represent interest on them, and were, therefore, simply contract obligations of the East River Company.

The original complaint alleged the execution and delivery of the bonds by the East River Company; that there were annexed to the bonds the coupons in question; that the Manhattan Company became the successor of the East River Company and acquired its properties subject to the mortgage and the payment by it of the said bonds and coupons; and after setting out the coupons sued on, alleged that the Manhattan Company "is ready and willing and has promised and agreed to pay the principal of said coupons, to wit, thirty dollars; but declined to pay interest thereon."

The fact that the Manhattan Company had acquired the franchise and property of the East River Company, subject to the payment of the bonds and coupons, and was ready and willing to pay the coupons, imposed no legal obligation unless it had by a valid agreement, based upon a consideration, assumed the payment of the obligations of the East River Company (*Fernschild* v. *Yuengling Brewing Co.*, 15 App. Div. 29, affd., 154 N. Y. 667); and the only allegation in this complaint which would impose such an obligation is that which alleged that the Manhattan Company had promised and agreed to pay the principal of the coupons. The defendant, the Manhattan Company, interposed an answer in which it admitted that, as the successor of the East River Company, it was at all times ready and willing to pay the said coupons to the lawful holder thereof when presented, and still is ready and willing to pay the same, and did not either admit or deny the allegation of the com-

plaint that it had promised and agreed to pay the coupons. Subsequently the Manhattan Company consolidated and became merged with the Edison Electric Illuminating Company, and after such consolidation the plaintiff served an amended complaint containing the same allegations as to the Manhattan Company. The defendant interposed an answer to the amended complaint in which it denies the allegation that the Manhattan Company was the lawful successor of the East River Company and that it was ready and willing to pay these coupons or had ever promised and agreed to pay them. Upon the trial, to prove the allegation that the Manhattan Company had agreed to pay these coupons, plaintiff introduced the original answer of the Manhattan Company with a letter of the attorney of the company. At the close of the case the defendant moved to dismiss the complaint upon the ground, among others, that there was no evidence that the Manhattan Company had ever assumed the payment of these coupons or agreed to pay them. This was denied upon the ground that the admission in the first answer was evidence of such an agreement and that question was left to the jury, who found a verdict for the plaintiff.

I think the complaint should have been dismissed. The original complaint had alleged that the coupons sued on were attached to the bonds and were secured by the mortgage, and that the Manhattan Company was ready and willing and had promised and agreed to pay them. The answer admitted that the company was ready and willing to pay the face value; but that was not an admission of a legal liability to pay, much less an admission of an express promise to pay. There is no affirmative allegation in that answer which could be construed to be an admission or declaration that any such engagement or promise existed. The failure in that answer to deny the allegation of such an express agreement in the complaint prevented the defendant from disputing that allegation so long as that answer stood as a pleading in the case; but when the plaintiff served an amended complaint and the defendant interposed its answer thereto, the answer to the original complaint was superseded. While a statement of fact in the answer was evidence of the fact alleged, as a declaration of the defendant, it has never been held that the mere omission to deny an allegation was an admission of its truth, except so far as, upon the trial of the action in which the answer failing to

deny the allegation had been interposed, the defendant was precluded from questioning the truth of the allegations to which there was no denial. In *Dale* v. *Gilbert* (128 N. Y. 625) it is said: "In this respect it is like an admission in a pleading. While the admission remains, evidence is not admissible to show that the party does not rely upon it. It is an admission of record and is conclusive. If the pleading be amended by striking out the admission the truthfulness of the admission is still a question, when proven to have been made, but it is not conclusive upon the party who made it and he may give evidence to show that it was made inadvertently and mistakenly, and then the jury must decide whether, on the explanation, it be correct." (See *Paige* v. *Willet*, 38 N. Y. 28.) The mere failure to deny an allegation in the complaint, however, is not such a declaration of a fact as to be admissible in another action between the same parties, or in the same action in which the pleading has been superseded by an amendment, to prove the existence of the fact.

The defendant has made no declaration or statement which admits that it had promised and agreed to pay these coupons; and the plaintiff's right to recover depends entirely upon the proof of such an expressed promise by the defendant. The defendant was quite willing to admit that it stood ready and willing to pay all coupons that represented interest upon bonds secured by the mortgage upon its property. When it appeared, however, that these coupons did not represent interest upon bonds secured by a mortgage upon the property, an entirely different question was presented as to its willingness to pay. And the mere fact that the defendant had failed to deny a promise to pay coupons which were alleged to be those representing interest on these bonds when that issue was presented was certainly no evidence to show that the defendant had promised and agreed to pay coupons which did not represent interest on bonds secured by mortgage upon its property, but at most represented an ordinary contract obligation to pay money of a corporation with which the defendant was not connected, and for the fulfillment of whose obligations it was not responsible.

The only other evidence introduced by the plaintiff which it was claimed tended to show that the Manhattan Company had agreed to pay these coupons was a letter addressed to the company by its attorneys. A witness was called by the plaintiff who testified that

he called upon Mr. Hemmens, one of the defendant's attorneys, with five of these coupons and received from him a letter addressed to the company. That letter is as follows: "The bearer Mr. Baltes has five coupons of the East River Electric Light Company's bonds, which seem to be all right. We advise that they be paid if there is no record that like numbers have already been paid." This letter was advice given by an attorney to his client, and contained no admission of any fact except that the bearer of the letter had five coupons which seemed to be all right. The attorney advised the defendant that they might be paid. But that advice was certainly no admission of any contract on the part of the defendant to pay them, and was evidently based upon the fact that these were coupons of the bonds representing interest thereon. The evidence in the case shows that the presumption was a mistake; and certainly advice given by an attorney to his client based upon a mistaken fact is not evidence of any fact.

I think, therefore, that the defendant's motion to dismiss the complaint should have been granted.

But assuming that this answer could be treated as an admission of some legal obligation of the defendant, the Manhattan Company, to pay these coupons, it was simply an admission which the defendant could rebut. On behalf of the defendant a witness was called who testified that he was auditor of the New York Edison Company; that he was director and secretary of the Manhattan Electric Light Company for four years; that he was a director of the Manhattan Electric Light Company at the time of the consolidation of that company with the Madison Square Company; that the Manhattan Company did not have possession of any of the books of account, ledgers or any other books formerly owned by the East River Electric Light Company or the Thomson-Houston Electric Light Company. He was then asked: "Did you make any agreement at any time to pay any debts of any other electric light corporation?" which was objected to as calling for a conclusion. This objection was sustained, to which there was an exception.

I think that this was error. The question did not call for a conclusion, but for the fact whether any agreement at any time had been made by the defendant corporation. It was direct evidence to overcome the effect of any alleged admission made by the

defendant corporation in its failure to deny the allegation of an agreement or promise to pay. The only way that the defendant could disprove the truth of a statement which was alleged to be an admission of a fact was by direct proof that the fact alleged to be admitted was not true. When the fact alleged to be admitted was that an agreement had been made, it certainly was competent for the corporation whom it was alleged had made such an admission to call its officers with knowledge of the affairs of the corporation, and prove that no such contract or agreement had been made. There was no proof of any particular agreement made at any particular time, and there was no method by which the defendant could prove that no such agreement had been made, except by calling its officers with knowledge of the affairs of the corporation, and offering their testimony that no such agreement had been made. There was no objection on the ground that the witness had no knowledge of the affairs of the corporation, the only objection being that the question called for a conclusion. And as this objection to the question was clearly incompetent, to sustain it was error.

McLaughlin, J., concurred.

Determination affirmed, with costs.

Peter W. Felix, Appellant, v. Daniel C. Devlin and Others, Respondents, Impleaded with Albert Meldon, Defendant.

Marketable title — effect of the words "be said dimensions and distances more or less" in a description — overlapping of grants of land under water — doubt arising therefrom as to the exact location of land and a doubt as to the obligation to record an instrument made prior to the recording act — it renders the title unmarketable — indefinite knowledge of an agent.

Peter W. Felix, who had purchased at an auction sale two distinct parcels of land under the waters of the North river, the larger parcel for $21,000 and the smaller parcel for $2,900, brought an action against the vendors to compel the specific performance of the contract, but claimed that he was entitled to a diminution of the purchase price on account of a deficiency in the quantity of the land embraced in the larger parcel, and of an alleged defect in the title of the smaller parcel.

With respect to the larger parcel, it was conceded that the vendors had no title to a small fragment thereof, the value of which fragment was fixed by the

plaintiff's experts at $1,000. The terms of sale of the larger parcel described the land by lot numbers and by distances, dimensions and boundaries as shown on a map, and contained the statement, "be said dimensions and distances more or less."

With respect to the smaller parcel, it appeared that the plaintiff's vendors claimed under a grant, known as the Devlin grant, made in 1852 and duly recorded in the register's office; that on December 4, 1804, a grant had been made to one Schieffelin and recorded in the city comptroller's office. It was a disputed question of fact whether the Schieffelin grant overlapped the grant to the plaintiff's vendors. It was, however, contended that the failure to record the Schieffelin grant in the register's office rendered it void as against the Devlin grant. In this connection it appeared that at the time the Schieffelin grant was made there was no existing recording act.

Held, that it was proper to require the plaintiff to take title to the larger parcel and pay the full contract price therefor, but that he should not be obliged to pay interest on such contract price from the date of the sale;

That the validity of the title to the smaller parcel being dependent upon a disputed question of fact as to the exact location of the land described in the Schieffelin grant, or upon a doubtful question of law as to the necessity of recording it, such title was unmarketable, and that the plaintiff should not be obliged to perform his contract with respect to that parcel.

Loose and indefinite knowledge as to the ownership of a small part of a lot by the agent of the contract vendee thereof, held not to destroy the force and effect of a subsequent contract for its purchase by his principal.

Semble, that the Schieffelin grant having been made at a time when there was no recording act in existence, the Legislature had no power to provide that that grant should be void as against subsequent purchasers who recorded their conveyances pursuant to the recording acts subsequently passed.

VAN BRUNT, P. J., dissented.

APPEAL by the plaintiff, Peter W. Felix, from a judgment of the Supreme Court in favor of the defendants Daniel C. Devlin and others, entered in the office of the clerk of the county of New York on the 12th day of November, 1902, upon the decision of the court, rendered after a trial at the New York Special Term, dismissing the plaintiff's complaint, and directing the specific performance by him of a contract for the purchase of real property.

Louis O. Van Doren, for the appellant.

Merritt E. Haviland, for the respondents.

O'BRIEN, J.:

The issue herein was defined by this court upon an appeal by this same plaintiff which presented another phase of the litigation which has grown up about the property involved, in the following

language: "The defendants in their answers admitted the making of the contract, and asked for a specific performance of it as it was made. So that the only question presented was whether the defendants were entitled to have the contract performed precisely as it was made, or whether Felix was entitled to the specific performance of the contract with a diminution of the purchase price by way of compensation for certain defects in the title and a deficiency in the quantity of the land sold." (50 App. Div. 332.)

The plaintiff at public auction purchased two distinct parcels of land under the waters of the North river for two different prices, the larger parcel, lying wholly north of One Hundred and Thirty-seventh street, for $21,000; and the smaller parcel, lying wholly south of One Hundred and Thirty-seventh street, for $2,900. The plaintiff brought this action to obtain a specific performance of the contract of sale, but claimed that he was entitled to compensation for diminution in the value of the parcels due to two considerations which may be briefly stated: *First*. That the vendor had no title to a fragment of the larger parcel, namely, a piece on the northwest corner of One Hundred and Thirty-seventh street and Twelfth avenue, about three feet long on Twelfth avenue and six inches on One Hundred and Thirty-seventh street, which had been deeded to the Hudson River Railroad Company; and *second*, that a part of the smaller parcel was affected by a grant made by the city of New York dated December 4, 1804, and recorded in the office of the comptroller, which projected into and occupied a part of the area of land conveyed under the terms of sale to the plaintiff.

In view of the protracted litigation which has ensued and the voluminous record consisting of the maps and expert testimony bearing upon the questions in dispute it would exceed the limits of an opinion to give in detail the reasons for our conclusion, and it will be necessary only to briefly refer to them.

With respect to the larger parcel which is affected by the grant to the railroad company it is conceded that the vendor has no title to the small piece thereof on the northwest corner of One Hundred and Thirty-seventh street which, as stated, is three feet in length on the avenue and measures six inches on One Hundred and Thirty-seventh street. The only testimony as to the value of this small strip was that furnished by one of the plaintiff's experts who fixed

its value at $1,000. The terms of sale to the plaintiff described the land by lot numbers and by distances, dimensions and boundaries as shown on a map according to which the property was sold, which terms contained the statement, "be said dimensions and distances more or less."

Thus qualified, the description of the property as appearing on the map was deemed by the learned judge at Special Term sufficient to obviate the objection made as to the fragment which had been conveyed to the railroad company. Although the fragment is small, considering its location as bearing upon and affecting the value of the land, we think it would have been equitable, at least if plaintiff is to be compelled to take the title to the larger portion as thus diminished in value, that he should not be mulcted with interest upon the purchase price from the date of the sale. What if anything may have been received from the property by way of rents went to the defendants; and although we do not think that we should interfere with the judgment of the Special Term as to the validity of the title the additional term imposed of interest was, in our opinion, inequitable.

We have not overlooked the contention of the defendants based upon what they claim to have been the knowledge of plaintiff's agent as to the condition of the property at the time of the sale. The fact that he made inquiries as to the rights of the railroad and may have been familiar with the general situation of the property, did not, however, prevent the plaintiff from relying upon the contract of the defendants whereby, as shown by the terms of sale, they undertook to sell and did sell to the plaintiff the lot including the fragment conveyed to the railroad. In other words, loose and indefinite knowledge possessed by the agent could not destroy the force and effect of a subsequent contract, and we have, therefore, approached the consideration of the questions involved having in view the legal rights of the parties as fixed by their contract. Upon this branch of the case we think the plaintiff is entitled to a specific performance to the extent that the defendants are able to comply, which will include a conveyance of the larger parcel less the fragment in dispute, the defendants to be allowed to retain whatever they may have collected in the way of rents and the plaintiff not required to pay any interest upon the amount of his bid.

As to the smaller parcel, we think the doubt arising as to the extent and location of the Schieffelin grant of 1804 renders the title to the land unmarketable. The fact of the Schieffelin grant having been established, the whole controversy was waged as to its extent and location. Such grant appears upon two different city maps made respectively by Serrell and Smith, and we have in addition the map prepared by the plaintiff's expert which shows the water grant to Schieffelin located in accordance with what is its language and following the official maps, and would tend to prove that this grant overlaps and occupies part of the area of the smaller parcel here involved. There is, of course, the defendants' evidence which would tend to show by the language of the instrument that the westerly boundary of the Schieffelin grant was fixed at low-water line. After thus locating the westerly boundary, it is argued that the lateral lines of the grant should be laid out perpendicularly to the general course of the shore of the Hudson river and this may be done without any overlapping. There is, however, just as much reason for following the lines of the grant from Eleventh avenue and One Hundred and Thirty-sixth street, and, as the lines from Eleventh avenue run in a northwesterly direction, if we continue them along in the same course without change or divergence they will bring us to the lot in question. Upon the evidence, therefore, a disputed question of fact is presented as to the exact location of the Schieffelin grant.

We have not overlooked the additional argument presented by the defendants that as the Schieffelin grant was not recorded in the register's office prior to the recording of the grant from the mayor to Devlin, it is, therefore, void as against them. The Schieffelin grant is dated December 4, 1804, and recorded in the book of water grants in the city comptroller's office. The Devlin grant was made in 1852 and was duly recorded in the register's office. In support of the argument that the failure to record the Schieffelin grant in the register's office makes it void as against the subsequently recorded Devlin grant, we are referred to the case of *Fort* v. *Burch* (6 Barb. 60) which is quoted with approval in *Westbrook* v. *Gleason* (79 N. Y. 23). It appears, however, on the other hand, that the earliest recording act in relation to deeds of lands in the city of New York was passed in 1810 (Laws of 1810, chap. 175), and the Legis-

lature passed the general recording act in 1813 (Revised Laws of 1813, chap. 97). The Schieffelin grant, therefore, was made at a time when there was no existing recording act; and the question is presented whether or not the Legislature has the power to declare deeds or grants, good when made and which were not then required to be recorded, void as to subsequent purchasers if not recorded pursuant to some later provisions of law. The case of *Varick's Ex'rs.* v. *Briggs* (22 Wend. 543) is seemingly an authority for the proposition that the Legislature has not the power to render invalid a deed, which was good when made, and when there was no recording act, by subsequent legislation rendering a failure to record such a deed void as to subsequent purchasers.

We have, therefore, a case wherein we are asked to resolve a disputed question of fact or a doubtful question of law in the absence of parties who upon the settlement of such questions would be entitled to be heard. (*Fleming* v. *Burnham*, 100 N. Y. 1.) That case is an authority for the proposition which is now well settled that "the purchaser of land at a judicial sale is entitled to a marketable title. A title open to a reasonable doubt is not a marketable one, and the court cannot make it one, by passing upon an objection depending on a disputed question of fact or a doubtful question of law, in the absence of the party in whom the outstanding right is vested."

In this condition of the title it would be improper for us to direct the conveyance of the parcel to the plaintiff, and impracticable to determine what if any allowance should be made him because of the diminution in value resulting from the doubt which exists as to whether the land is or is not affected by the Schieffelin grant.

The judgment should be accordingly modified by directing that as to the smaller parcel plaintiff be released from his purchase, and by striking out the interest on the purchase price of the larger parcel, and the costs of the court below; and as so modified the judgment should be affirmed, without costs to either party in this court.

PATTERSON, MCLAUGHLIN and LAUGHLIN, JJ., concurred; VAN BRUNT, P. J., dissented.

Judgment modified as directed in opinion, and as modified affirmed, without costs to either party.

JAMES S. McVITY, Respondent, v. THE E. D. ALBRO COMPANY, Appellant.

Guaranty by a corporation of the payment of dividends upon its stock — it cannot repudiate the guaranty as ultra vires *and retain the consideration received by it therefor — right of a purchaser of such stock on the faith of such guaranty to rescind the contract of purchase — a resident of the State of New York is not chargeable with knowledge of the laws of the State of Ohio.*

In 1899 James McVity, who held a demand note for $10,000 bearing six per cent interest, which had been executed by the E. D. Albro Company, a business corporation organized under the laws of the State of Ohio, made a demand for a payment of $5,000 on account of the note. In reply thereto he received a letter dated April 22, 1899, signed "E. D. Albro Co., W. H. Justice, Prest." offering to pay the $10,000 in cash, but stating, "we can and will pay you at once cash $5,000.00 and are willing to sell you five shares of the company's stock at the par value of $1,000.00 per share and guarantee you on same a six per cent dividend annually. Of course we expect to pay more dividend, but we are willing to guarantee a six per cent dividend and will also agree, or Mr. McDougall and Mr. Justice will jointly agree, to buy the stock back from you, say at the end of two or three years, at the same price per share, you having a guarantee of a six per cent dividend in the meanwhile."

May 10, 1899, Mr. Justice, the president of the corporation, visited McVity and stated that if McVity would take stock in exchange for the note they would guarantee a dividend of six per cent on the stock. McVity asked if the stock would be preferred stock, to which Justice replied that it would be stock guaranteed by the Albro Company, which they had a right to do.

McVity after some negotiations received in exchange for the $10,000 note and $1,000 cash which he advanced to the company, its note for $3,000, and eight shares of its stock with the following letter:

"MR. JAS. S. McVITY

"DEAR SIR.—You hold the note of The E. D. Albro Co. for $10,000.00 bearing Int. at 6%. If as proposed you will buy 8 shares of The E. D. Albro Co. stock we will guarantee you a 6% dividend on same payable quarterly and the remaining $2,000.00 we can arrange as you may desire.

"This is the arrangement proposed by Mr. McDougall, and he and Mr. Justice will agree to purchase back the stock at par within 2 to 3 years if you wish to sell, and you are guaranteed a dividend of 6% per annum in the meanwhile.

"Yours truly,

"THE E. D. ALBRO CO.

"W. H. JUSTICE

"*Prest.*"

The corporation paid six per cent dividends upon the stock and various sums upon the $3,000 note until December 31, 1901, when it notified McVity that the

company was not earning any dividends and consequently could not lawfully pay any; also that it had no power to guarantee the payment of dividends upon its stock.

McVity then offered to surrender the stock and guaranty in return for the $10,000 note and to allow the dividends paid on the stock to be applied to the interest upon the note.

The position taken by the corporation, with respect to its inability, under the laws of the State of Ohio, to declare dividends which it had not earned or to guarantee the payment of dividends on its stock, was correct. McVity, however, was a resident of the State of New York and was not familiar with the laws of the State of Ohio.

Held, that McVity was not chargeable with knowledge of the laws of the State of Ohio;

That he was entitled to rescind the purchase of the stock, and upon surrendering such stock to receive the $10,000 note back from the company;

That the corporation could not repudiate its obligation of guaranty to McVity on the ground that it was *ultra vires*, and at the same time retain the consideration which it had received from McVity for entering into the obligation.

VAN BRUNT, P. J., and LAUGHLIN, J., dissented.

APPEAL by the defendant, The E. D. Albro Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 16th day of June, 1903, upon the verdict of a jury for $9,234.60, and also from an order bearing date the 12th day of June, 1903, and entered in said clerk's office denying the defendant's motion for a new trial made upon the minutes.

James R. Burnet, for the appellant.

Ernest Hall, for the respondent.

INGRAHAM, J.:

The defendant is a foreign corporation, organized under the laws of the State of Ohio. In April, 1899, and prior thereto the defendant was engaged in dealing in lumber in the city of New York. The material facts, which are not seriously disputed, are that in April, 1899, the plaintiff held the defendant's note for $10,000 for money loaned which was payable on demand with interest at the rate of six per centum per annum; that the plaintiff wrote a letter to the defendant asking for payment of $5,000 on account of this note; that in answer to this demand the plaintiff

received a letter from the defendant corporation, signed "E. D. Albro Co., W. H. Justice, Prest.," which was as follows: "* * * In your recent letter to Mr. Justice you stated you would like to have say, $5,000.00 in cash. Our stockholders all agreed on one point and that is that we much prefer to pay the note in full and, therefore, we repeat that it would give us pleasure to hand you check for $10,000.00 at once if you so desire and we can arrange the interest due on our note for $10,000.00 by short time notes. As you mention, however, that $5,000.00 in cash is the sum you wish to get, we all join in the suggestion and it is simply a suggestion and offer to you in the true spirit of good advice for your interest and not for ours that we can and will pay you at once cash $5,000.00 and are willing to sell you five shares of the company's stock at the par value of $1,000.00 per share and guarantee you on same a six per cent dividend annually. Of course we expect to pay more dividend, but we are willing to guarantee a six per cent dividend and will also agree, or Mr. McDougall and Mr. Justice will jointly agree, to buy the stock back from you say at the end of two or three years at the same price per share you having a guarantee of a six per cent dividend in the meanwhile. * * * Please understand that we are not anxious to sell Albro Company stock but are willing to sell you five shares if you desire to purchase it on the basis mentioned. Our preference you understand is to pay the note in full $10,000.00 at once * * *."

This letter was dated April 22, 1899, and about the 10th of May, 1899, Mr. Justice, the president of the company, called upon the plaintiff in New York city. Mr. Justice said that he had called to see the plaintiff in reference to the E. D. Albro Company's demand note which the plaintiff held, and referred to the letter of April twenty-second. He then told the plaintiff of the prosperity of the company and that they had ten years' good business before them, and that the company expected to pay ten per cent if not more. He then offered to the plaintiff that if the plaintiff would take the stock of the company they would guarantee a dividend of six per cent per annum in exchange for the note. The plaintiff asked him if that would be preferred stock, to which Justice answered that it would be stock guaranteed by the Albro Company, which they had a right to do; the plaintiff replied that he did not care about buying stock,

as he was well advanced in years and would prefer to have the note go on as it was on the books, and if they did not want to do that they could pay the note in full in cash. To that Justice said that it was not convenient for them to pay cash on the note at that time, and the plaintiff said that he would think the matter over and would see him again. The plaintiff, having confidence in Justice and believing what he said, in a day or two afterwards called upon Justice at the office of the company in New York, when Justice asked the plaintiff what he had decided about taking stock. The plaintiff said, "no, I didn't see where I was going to be benefitted by taking stock for my note, which was six per cent. per annum, and the stock wouldn't pay any more." Justice replied that this note was the only obligation of the kind that they had on their books, and they wanted to get it off their books as a liability. "He then said that the Company would sell me eight shares of stock and guarantee me a dividend of six per cent. per annum, payable quarterly, and the balance, $2,000, they would pay in cash in exchange for my demand note," and that, in addition, they would give the plaintiff an additional advantage and that was that the company would continue the interest on the note from that time, from the first of January to the first of July, and that the Albro Company had decided to pay dividends, to commence them on the 1st of July, 1899, and that if he would decide then and there to take stock, he would get a dividend in July. The plaintiff said that he would accept his offer, that is, that he would accept eight shares of stock at par with their guaranty of six per cent per annum, payable quarterly, and the balance, $2,000, to be paid in cash in exchange for the note. As a result of this conversation, early in June the plaintiff received from Justice eight shares of the capital stock of the defendant corporation at the par value of $1,000 each, and with it the following letter:

"NEW YORK, *May* 13, 1899.

"MR. JAS. S. McVITY

"DEAR SIR.—You hold the note of The E. D. Albro Co. for $10,000.00 bearing Int. at 6%. If as proposed you will buy 8 shares of The E. D. Albro Co. stock we will guarantee you a 6% dividend on same payable quarterly and the remaining $2,000.00 we can arrange as you may desire.

"This is the arrangement proposed by Mr. McDougall, and he

and Mr. Justice will agree to purchase back the stock at par within 2 to 3 years if you wish to sell, and you are guaranteed a dividend of 6% per annum in the meanwhile.

"Yours truly,

"THE E. D. ALBRO CO.

"W. H. JUSTICE

"*Prest.*"

The certificate for eight shares of stock and the letter accompanying it were delivered to the plaintiff by the president of the company. At the time it was delivered Justice told the plaintiff that he would like to continue the $2,000 as an account until the 1st of January, 1900, and Justice, on behalf of the company, then borrowed an additional $1,000 in cash from the plaintiff as a loan and gave a note of the corporation for $3,000, which the plaintiff accepted and delivered the note for $10,000 to the defendant. Thereupon and down to December thirty-first the defendant paid dividends of six per cent upon the stock owned by the plaintiff and also made various payments on account of the note for $3,000, until at the time of the commencement of the action there was due upon the note for $3,000, $400, with interest from July 1, 1902. On December 3, 1901, the plaintiff received from the defendant the following letter dated Cincinnati, O., December 3, 1901:

"DEAR SIR.— * * * As to the dividends, some of our stockholders have entered a protest and this protest will have to be heeded, because it is an *ultra vires* act and beyond the power of any officer of this Company to pay dividends when the Company is not earning them."

In reply to this letter the plaintiff, on December 15, 1901, wrote a letter as follows:

"THE E. D. ALBRO COMPANY:

"GENTLEMEN.— * * * I note what you say (and which has been before intimated by you), that it was beyond the power of the Company to issue stock with guarantee of dividend. This transaction was entered into at the request of the Company, and it was supposed at the time that it was a good thing both for the Company and myself, and I supposed it was done on the advice of the Com-

pany's legal adviser. I had no idea at the time of the transaction that it was unlawful, and of course I ought not to hold you to it if it was, and have no desire to do so. Will you kindly advise me if it is the judgment of the Company and its present legal adviser — that it was beyond the power of the Company to issue the stock with the guarantee of dividend which I hold. I want my affairs with the Company adjusted as far as possible without friction, and if your Company holds that it was beyond its power to issue the stock, with the guarantee of dividends which I hold, I offer to return the stock to you, properly endorsed for surrender or transfer, together with the guarantee executed by the Company at the time of the issue of the stock, you to return me the Company note for $10,000, which I gave up when the stock and guarantee was given me, on which you may endorse payment of interest (which I received under the agreement as dividends, to October 1st, 1901, together with payment of Two Thousand Dollars on account of principal.

"Yours truly,

"JAMES S. McVITY."

This letter does not seem to have been answered by the defendant, when the plaintiff, on January 10, 1902, sent a copy of the letter to the defendant, with a request for an immediate reply. In answer to that, on January 16, 1902, the plaintiff received a letter from the legal adviser of the defendant, dated Cincinnati, January 16, 1902, which stated that in the opinion of the writer the alleged guaranty of dividend upon the stock referred to, was made without the authority of the company itself; "furthermore, even if the Company had authorized the guarantee, it would have been *ultra vires*, because a corporation has no right to guarantee to an individual stockholder the dividend upon his stock. This being the case, the Company as now constituted cannot now undertake to be responsible for the unauthorized act of some former management of the Company, and it is not in a position to receive from you the stock, nor to give you its note for $10,000 as you request. You could have known, as a matter of law, at the time that the Company could not make such a stipulation. Having taken the stock, under the circumstances set forth, you are not entitled to return it to the Company and receive therefor the Company's note."

The plaintiff testified that he did not at any time know that it was forbidden in Ohio to pay more than the company earned. For the defendant, Mr. Cassatt, a member of the bar of the State of Ohio, was called as a witness and testified that he was familiar with the law of Ohio relating to corporations; that there was no authority under the law of that State for a corporation to guarantee a dividend upon its capital stock; that by the law of Ohio dividends can be declared by the company upon only what are called the surplus profits of the company; and certain statutes of the State of Ohio relating to the powers of corporations were introduced in evidence. By these statutes it was made unlawful for the directors of any corporation organized under the laws of that State to make dividends, except from the surplus profits arising from the business of the corporation. (See Laws of Ohio, vol. 85, p. 182, as amd. by vol. 86, p. 228.)

Both the plaintiff and the defendant then asked for the direction of a verdict, whereupon the court granted the motion of the plaintiff and directed a verdict in favor of the plaintiff for the amount due upon the note of $10,000, and from the judgment entered upon that verdict the defendant appeals.

Each of the parties asked for the direction of a verdict and, there being no application to submit any question to the jury, the question presented is whether upon these facts the plaintiff was entitled to a verdict. This corporation, being organized under the laws of the State of Ohio, was subject to the law of that State and had such power as that State had granted to it. Whether or not it was authorized to issue stock with a guaranty of dividends, which would make it entitled to dividends in preference to other stock of the corporation, was a question to be determined by the laws of Ohio, and as to the law of that State the plaintiff, a resident of New York, was not chargeable with knowledge. There is nothing that would restrict the power of the Legislature of the State of Ohio to confer upon a corporation organized under its authority, power to guarantee dividends upon the stock of the company, even though such dividends would be payable out of the capital of the company, as distinguished from its profits or surplus earnings. Notwithstanding the fact that the defendant had expressed to the plaintiff a great desire to pay this note in cash, it endeavored to induce the

plaintiff to make some terms with the company by which a payment could be prevented. It accomplished that result by inducing the plaintiff to surrender the note in return for shares of the stock of the company on which the company would guarantee the payment of a dividend of six per cent and upon the representation by the defendant's president that the defendant had a right to issue its stock and guarantee the payment of dividends.

The plaintiff testified and it was not disputed that "I then asked him (the president) if that would be preferred stock. He answered me by saying it would be stock guaranteed by the Albro Co., which they (Albro Co.) had a right to do." Here was a distinct representation by the president of the defendent to induce the plaintiff to accept the stock of the corporation, that the defendant had a right to make such a guaranty, and that right depended upon the law of the State of Ohio, with knowledge of which the plaintiff was not chargeable. The plaintiff expressly swears that he relied upon this statement of the president and that he had no knowledge of the fact that such an arrangement was in violation of the laws of Ohio. The defendant thus accepted a surrender of the plaintiff's note, based upon a delivery of the stock with the guaranty of the defendant that it would pay dividends upon the stock at the rate of six per cent per annum, and that guaranty was faithfully observed by the defendant down to the end of the year 1901, when, for the first time, the defendant informed the plaintiff that the agreement of guaranty was invalid by the law of the State of Ohio and refused to comply with it; that the representations made by the defendant's president, and upon which it obtained the note of the defendant which was held by the plaintiff, were false; that the guaranty was not a legal obligation of the company for which he acted, and that the plaintiff was not entitled to receive the dividends which the corporation had guaranteed, upon the basis of which guaranty the plaintiff had surrendered this obligation of the defendant.

I think it clear that under this condition the plaintiff was entitled to rescind this purchase of the stock and to receive back the obligation of the company upon the delivery to the company of the stock that he had received. The plaintiff was not a lawyer. He had been for some time in the employ of the defendant. He had loaned his money to the defendant, relying upon its obligation to repay it

to him upon demand. He had been induced to surrender that obligation of the defendant upon the distinct representation by the defendant's president that the stock that the defendant had offered to sell him was stock of the company, with a guaranty of a dividend of six per cent, and that the corporation had power to issue stock with such a guaranty, and relying upon this representation the plaintiff accepted the stock and delivered up the obligation of the company that he held. What the defendant offered to give to the plaintiff and what the plaintiff understood he was to receive from the defendant was stock of the defendant, dividends of which were guaranteed. The defendant delivered the stock and what purported to be such a guaranty. The arrangement was for the benefit of the defendant, suggested by its president, and accepted by the plaintiff as the defendant's offer.

It is opposed to established principles that the defendant should be allowed to repudiate its obligation upon the ground that the obligation that it assumed to the plaintiff was *ultra vires*, and at the same time retain the consideration that it had received for giving this void guaranty. This question is very satisfactorily treated in *Pullman's Palace Car Co.* v. *Central Trans. Co.* (171 U. S. 139), and it was there expressly held that upon disaffirmance by a corporation of an act which is *ultra vires*, the corporation must restore the other party to his former condition as far as possible upon the disaffirmance of a void contract, and return all property that it has received as a consideration for that contract or its value. In *Central Transp. Co.* v. *Pullman's Palace Car Co.* (139 U. S. 60) Mr. Justice Gray, in delivering the opinion of the court, said: "A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract to be recovered back, or compensation to be made for it." It has been settled in this State that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been in good faith fully performed by the other party, and the corporation has had

the benefit of the performance and of the contract; that "when it (the contract) becomes executed by the other party, it (the corporation) is estopped from asserting its own wrong and cannot be excused from payment upon the plea that the contract was beyond its power." (*Vought* v. *Eastern Building & Loan Assn.*, 172 N. Y. 508.) But when the corporation expressly repudiated its agreement upon which it had obtained this plaintiff's property, and as a basis for such repudiation proved that the act was *ultra vires* and prohibited by the statutes of the State from which it had derived its right to exist, the other party to the contract certainly had the right to rescind the whole transaction, and the defendant was then bound to restore the plaintiff to the same condition that he was in when the void contract was executed.

There is no justification in the evidence for the statement that this guaranty of dividends was not the substantial inducement under which the plaintiff accepted these shares of stock in discharge of the defendant's indebtedness to him; and having acted upon the representations of the defendant's president that he was acting for the corporation and that the corporation had the power to make such a guaranty, the defendant corporation cannot retain the benefit of the transaction and hold its obligation which it has obtained from the plaintiff, and repudiate the authority of the president to make such a contract on behalf of the corporation. By accepting and retaining the note held by the plaintiff the corporation ratified the act of its president in making the contract with the plaintiff, and but for the fact that the guaranty is prohibited by the laws of the State of Ohio the guaranty would be a perfect, valid obligation of the defendant, which it, while retaining its benefits, could not repudiate upon the ground that the defendant's president had no authority to make it. It is sound law, as well as sound morals, that a party to a contract cannot repudiate the contract and his obligations under it and at the same time retain the consideration that he has received for making the repudiated promise; and whether the promise is repudiated because it was made by an agent without authority or because it was *ultra vires* or beyond the power of the party making it, or for any other reason, when the obligation upon one party is repudiated, the other party has the right to receive back the consideration which it has paid for the repudiated contract

or repudiated obligation. This general rule applies with greater force where the innocent party who has paid his money or delivered his property based upon the invalid promise, has been induced to part with money and accept the promise upon the distinct representation of the promisor that the obligation was valid and that the promisor was authorized to make it. All of these facts appear in this case. This defendant stands in a position of a corporation accepting from the plaintiff a discharge of its admitted obligation based upon a promise to pay six per cent dividends upon the stock transferred to the plaintiff in satisfaction of that obligation. It repudiates that obligation, and then seeks to retain its obligation which the plaintiff has delivered to it based upon that promise. Certainly no corporation or individual can retain the benefit received on account of a void obligation while repudiating the obligation.

I think that the judgment and order should be affirmed, with costs.

Patterson and Hatch, JJ., concurred; Van Brunt, P. J., and Laughlin, J., dissented.

Laughlin, J. (dissenting):

Two causes of action are alleged in the complaint, but the appeal only involves a consideration of the first which is for the recovery of $8,000, a balance alleged to be due and owing on a demand note for $10,000 given by the defendant to the plaintiff on the 1st day of January, 1897. The plaintiff had for several years been in the employ of the defendant as a traveling salesman, and the note was given for a balance due for services and moneys loaned. It is alleged in the complaint that the note was surrendered to the defendant on the 13th day of May, 1899, at its request, and that the plaintiff was induced by the president of the defendant to accept therefor eight shares of the capital stock of the defendant of the par value of $1,000 each, with a guaranty in writing that the defendant would pay six per cent dividends on the stock annually, and a new note of the defendant for $3,000, representing $2,000 of the indebtedness covered by the $10,000 note and a further indebtedness for a subsequent loan of $1,000; that the president of the defendant represented that the stock had been lawfully issued and

that "the defendant had power and authority by its charter to issue such stock and guarantee dividends thereon," and that the plaintiff believed these representations and relied thereon; that the defendant paid dividends on the stock at the rate of six per cent per annum until the 1st day of October, 1901, and the further sum of $20, and then declined to pay dividends on the grounds that the earnings of the company would not justify it and that the guaranty was void; that the plaintiff tendered a return of the stock and demanded a return of the note for $10,000 and offered to credit defendant thereon the $2,000 represented by the other note and, as interest, the amounts paid as dividends and that the note for $10,000 is not now in possession of the plaintiff. The defendant in its answer denies the guaranty and denies that the president of the defendant had authority to execute the same and alleges that the guaranty if executed was void and that plaintiff had either actual or constructive notice thereof. The other material allegations of the complaint are admitted.

The defendant was incorporated on the 8th day of February 1878, pursuant to an act of the Legislature of the State of Ohio passed on the 1st day of May, 1852, and the acts supplementary and amendatory thereto. The purpose of its incorporation, as stated in the certificate, was "buying and selling foreign and domestic woods in the log or otherwise and of manufacturing the same into planks, boards and veneers, and of disposing of the same, and doing a general lumber business, and holding such real and personal estate as may be deemed necessary and convenient to carry into effect the object of the incorporation." It was stipulated upon the trial that the General Statutes of Ohio show that no corporation incorporated under the laws of that State since the 1st day of May, 1852, "has had at any time power to guarantee dividends on its capital stock." It also appears by those statutes that dividends may be lawfully paid only from the surplus profits arising from the business of the corporation and the method of calculating profits is therein regulated. The plaintiff testified that in April, 1899, he wrote the defendant asking payment of $5,000 on its note for $10,000 which he held; that on the twenty-second day of the same month he received a letter in the name of the company signed by its president, saying that the stockholders of the company preferred to pay the note in full and

that the company was ready to hand him a check for the face of the note, but, since he only desired $5,000, the stockholders joined in the suggestion, for his interest and not for theirs, that he take $5,000 in cash and purchase five shares of the company's stock upon which six per cent dividends annually would be guaranteed and that the company would agree, or two of its stockholders named in the letter would jointly agree, to buy his stock at the end of three years at the same price although the company would prefer to pay the note in cash and was not anxious to sell stock as it was expected that greater dividends than six per cent would be paid; that about the tenth of May thereafter the president of the company called at the plaintiff's house with reference to the note and correspondence, and spoke of the prosperity of the company and of its good prospects, saying that it expected to pay ten per cent dividends, if not more, and that the stockholders with whom plaintiff was acquainted were all anxious that he should take stock, and "offered to me that if I would take stock of the Albro Co. that they would guarantee a dividend of six per cent per annum in exchange for my note. I then asked him if that would be preferred stock. He answered me by saying that it would be stock guaranteed by the Albro Co., which they had a right to do;" that plaintiff replied that he did not desire to buy stock, and would prefer to let the note run or have it paid in full; that the president of the company then said that it was not convenient to pay cash on the note at that time, to which plaintiff replied that he would think the matter over and see the president of the company again; that he was well acquainted with the president of the defendant and believed all that he said; that he had another conversation with the president of the company a day or two later; that the president then informed him that this was the only note of the kind outstanding on the books of the company, and that they wished to get it off the books as a liability, and that the company would sell to him eight shares of stock and guarantee a dividend of six per cent per annum, payable quarterly, and the balance of $2,000 would be paid in cash in exchange for the $10,000 note, and, as an additional advantage to him, would pay interest on the note to the first of July, and would pay the first dividend on the stock on the first of July; that plaintiff then informed the president that he would accept the offer; that about

the first or second week in June the stock was delivered to the plaintiff by the president of the company, together with the following letter:

"NEW YORK, *May* 13, 1899.

"MR. JAS. S. MCVITY

"DEAR SIR. — You hold the note of The E. D. Albro Co. for $10,000.00 bearing Int. at 6%. If as proposed you will buy 8 shares of The E. D. Albro Co. stock we will guarantee you a 6% dividend on same payable quarterly, and the remaining $2,000.00 we can arrange as you may desire.

"This is the arrangement proposed by Mr. McDougall, and he and Mr. Justice will agree to purchase back the stock at par within 2 to 3 years if you wish to sell, and you are guaranteed a dividend of 6% per annum in the meanwhile.

"Yours truly,
"THE E. D. ALBRO CO.,
"W. H. JUSTICE
"*Prest.*"

The plaintiff received dividends on the stock down to the 1st day of October, 1901, as alleged. About that time the management of the company changed, and the condition of its business did not justify the payment of dividends thereafter. On the 3d day of December, 1901, the plaintiff received a letter from the company, written by its secretary, inclosing a draft to apply on the $3,000 note of the company, which he then held, and informing him that some of the stockholders had entered a protest against the payment of dividends, and that as the company was not earning dividends it would be an *ultra vires* act to pay them and the protest would have to be heeded. On the fifteenth of the same month he wrote the company, saying that he was not aware at the time that the agreement to pay dividends was unlawful, but that if it was, he ought not to hold the company and had no desire to do so, that if in the judgment of the company and its legal advisers it was beyond its power to issue the stock with the guaranty, he offered to return the stock properly indorsed for surrender or transfer and the guaranty also in exchange for the notes which he surrendered to the company on which he authorized the indorsement of payments, as interest, of the amounts he had received as dividends, together with $2,000 on

account of the principal. On the following day the attorneys for the company, to whom the plaintiff's letter had been referred, wrote the plaintiff, saying that the guaranty was made without the authority of the company, but that it would have been *ultra vires*, even if authorized, and that the company could not receive back the stock or return the note. It does not otherwise appear that the company authorized its attorneys to write this letter. The plaintiff then brought this action.

I am of opinion that the action cannot be maintained and that the judgment in favor of plaintiff should be reversed. The theory of the plaintiff seems to be that the guaranty of dividends was void, and that it was such an essential part of the consideration that when the company defaulted in paying dividends he was at liberty to rescind the contract by which he received the stock and to recover upon the original note which he had surrendered to the defendant and which was in its possession. There was no allegation or proof of fraud or mutual mistake and the plaintiff does not ask to have the contract set aside upon either ground, but claims the right of his volition and without the consent of the defendant to rescind it. The contract was fully performed on the part of the plaintiff unless it can be said that it undertook to give a valid guaranty which manifestly it could not do. The defendant did all that it agreed to do *at the time*, and paid the dividends according to the guaranty for more than two years. During all that time the plaintiff was a stockholder of record of the defendant company and it was not in default. It may be assumed that others became stockholders and third parties dealt with the company on the faith of its financial condition with this obligation to the extent of $8,000 apparently canceled. After this lapse of time upon the failure of the company to pay a dividend which, according to the guaranty, did not become due for more than two and one-half years after the agreement had become consummated, the plaintiff asserts the right to terminate of his own volition all his liability as a stockholder and to reinstate the company's original indebtedness to him. This I think he may not do. Doubtless the plaintiff relied on this guaranty and if he knew it was invalid perhaps he would not have surrendered the note and have accepted the stock; but whether so or not it was not a conditional sale. The sale was consummated. The guaranty if valid

was a covenant for the performance of obligations at future times, and its breach was, therefore, a breach of a condition subsequent and would afford no ground for rescinding the purchase of the stock. (*De Kay* v. *Bliss*, 120 N. Y. 91; *Lamson Consolidated Store Service Co.* v. *Conyngham*, 11 Misc. Rep. 428; 32 N. Y. Supp. 129; *Fairbank Canning Co.* v. *Metzger*, 118 N. Y. 260; *Goldsborough* v. *Orr*, 8 Wheat. 217; *Railroad* v. *Parks*, 86 Tenn. 554; *Morrow* v. *Iron & Steel Co.*, 87 id. 262; *Hoffman* v. *King*, 70 Wis. 372; *Tufts* v. *Weinfeld*, 88 id. 647; *Patterson* v. *Donner*, 48 Cal. 369.) Moreover, I think that if this guaranty is to be construed as an absolute undertaking on the part of the company to pay dividends regardless of whether they are earned or not, the plaintiff is chargeable with knowledge of its invalidity and cannot rescind upon that ground. Such a contract would be contrary to public policy as it would be in fraud of the rights of creditors and of the stockholders, and it is not conceivable that it would be valid anywhere. (*Lockhart* v. *Van Alstyne*, 31 Mich. 76; *Miller* v. *Ratterman*, 47 Ohio St. 141.) Furthermore, I think the principle that all persons dealing with a corporation are chargeable with notice of its corporate powers and that its charter, being the law of its existence, is carried wherever the corporation transacts business, is certainly applicable to the purchase of the capital stock of a corporation wherever made. (Morawetz Corp. [2d ed.] § 96; *Oil City Land & Improvement Co.* v. *Porter*, 99 Ky. 254.) In an action in the courts of this State between individuals and a foreign corporation, which pleaded that the contract upon which the action was based was *ultra vires*, the Court of Appeals applied this rule. (*Jemison* v. *Citizens' Savings Bank*, 122 N. Y. 135.) The plaintiff intended to become a stockholder of the corporation. He obtained all the stock that he bargained for and there is no question but that it is valid. The corporation of which he was becoming a stockholder at most agreed to pay six per cent dividend upon the stock. As has been observed, there is no question of bad faith. Undoubtedly this agreement was made in the confident expectation that the earnings would justify the payment of such dividends, but if it was intended to undertake absolutely for the payment of the dividends regardless of the earnings of the corporation, this at most was an innocent misapprehension on the part of the directors or managing officers as to their authority. Public policy

requires, I think, that in these circumstances, a purchaser of stock should not be at liberty years later to rescind his contract because the guaranty was an *ultra vires* contract. It is just and necessary to the protection of the rights of others that knowledge of the invalidity of the contract should be imputed to him.

There is room for argument that the true construction of this guaranty does not render it void, and there is authority for the construction that it was an undertaking to pay dividends on this stock as might be lawfully done from the earnings, instead of accumulating a surplus or in preference to other stockholders who had knowledge of the plaintiff's rights (*Lockhart* v. *Van Alstyne*, *supra*), but this is not an action upon the guaranty and that question cannot be decided now.

The judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event.

VAN BRUNT, P. J., concurred.

Judgment and order affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* THOMAS PUTNAM, Appellant, Impleaded with Others.

Grand larceny — a conspiracy to defraud, by inducing the victim to purchase stock under a representation that it could be sold at a higher price — declarations of the conspirators are competent against each other — order of proof — proof of a like transaction at the same time between some of the conspirators is competent against the others on the question of intent.

Upon the trial of an indictment for grand larceny it appeared that one Franke answered a newspaper advertisement which stated that a person having $4,000 in cash could make $12,000 inside of a week in a legitimate business transaction; that in response to Franke's letter one Herbert called upon Franke and informed him that a certain mining corporation which had struck a valuable vein of ore was anxious to purchase some of its own stock; that a certain engineer who was then sojourning in the Everett House, New York city, held 2,000 shares of the stock, and, being ignorant of the striking of the vein of ore, would sell his stock at such a price as would enable it to be resold to the mining company at a large profit.

Franke went to the office of the mining company and met one Weller, who assumed to be the treasurer of the company. Weller introduced Franke to one Quealey, its president. After some conversation Quealey agreed that if

Franke could obtain a number of shares of the stock of the mining company he would purchase them from Franke at $14 a share.

The following day Franke met Herbert at the Everett House to visit the alleged engineer, where Herbert conducted Franke to a room in which they found the defendant lying in bed apparently ill. During the course of the conversation the defendant stated that he was an engineer and had received 2,000 shares of the stock of the mining company for services rendered to it, and was willing to sell the same for $10 a share. Thereafter Franke paid the defendant $4,000 in cash for some 400 shares of stock in the mining company for which he received a certificate. After the purchase Herbert and Franke went to the office of the mining company. Quealey was not there and Franke became suspicious and told Herbert that he would not lose sight of him. Herbert, however, left the office upon some pretext and did not return.

Franke then went to the Everett House to look for the sick engineer, but found that the defendant had left the hotel, leaving word with the clerk that he was going to a hospital.

The stock of the mining company was of little or no value. No large strike had been made, and the company was not at the time in a position to purchase any stock.

Held, that the evidence clearly established that the defendant was guilty of grand larceny in the first degree;

That the facts showed that Herbert, Quealey, Weller and the defendant were all concerned in the commission of the crime to obtain Franke's money by trick and device; that each was a principal and that the admissions and declarations of Herbert, Quealey and Weller were, therefore, admissible against the defendant, although not made in the latter's presence;

That the error involved in admitting in evidence some of the conversations with Herbert and Quealey, before the People had proved facts sufficient to justify the inference that the defendant was an actor in the conspiracy, was cured by the subsequent introduction of evidence connecting the defendant with the conspiracy;

That proof that, while the transaction with Franke was taking place, Herbert, Quealey, Weller and one Clark successfully employed the same methods practiced on Franke to defraud one Effinger, who also answered the advertisement which Franke answered, was competent against the defendant, although it appeared that Clark took the part of the sick engineer and it was not shown that the defendant was connected directly with the transaction.

APPEAL by the defendant, Thomas Putnam, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 23d day of June, 1903, upon the verdict of a jury convicting the defendant of the crime of grand larceny in the first degree.

Max D. Steuer, for the appellant.

Robert C. Taylor, for the respondent.

Ingraham, J.:

The defendant was indicted for grand larceny in the first degree. He was duly convicted, and the main question upon this appeal is whether the proof justified that conviction.

Section 528 of the Penal Code provides that a person is guilty of larceny who, "with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person, either: 1. Takes from the possession of the true owner, or of any other person, or obtains from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing; or secretes, withholds, or appropriates to his own use, or that of any person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind."

Section 530 provides that a person is guilty of grand larceny in the first degree "who steals or unlawfully obtains or appropriates in any manner specified in this chapter * * * property of the value of more than five hundred dollars in any manner whatever."

There were three other persons joined in the indictment, but this defendant was tried separately. There is no question raised as to the sufficiency of the indictment, and the first question presented is whether the evidence offered by the People justified the submission of the question of the defendant's guilt to the jury. Section 29 of the Penal Code provides that a person concerned in the commission of a crime, whether he directly commits the act constituting the offense, or aids and abets in its commission, is a principal.

The story told by the witnesses for the prosecution, and upon which this conviction is based, is as follows: One Louis Franke on February 28, 1902, saw an advertisement in a newspaper, in which it was stated that a party with $4,000, ready cash, was wanted who could make $12,000 inside of a week; "no scheme; strictly legitimate business transaction; will bear thorough investigation; must act immediately; no brokers; principals only." Franke answered that advertisement. In response to his letter a man who gave his name as "Herbert" called upon Franke, produced Franke's letter, and handed him a prospectus of a Horseshoe Copper Mining Com-

pany. Upon Franke's stating that he did not wish to have anything to do with the mining scheme, Herbert read to Franke a letter which he claimed to have received from his brother, who was employed by this company in Arizona. In this letter it was stated that a valuable vein had been struck and the company was anxious to buy some of their own stock back; that a certain engineer, who had received 2,000 shares for services rendered, had come east, and Herbert was requested to find out where the engineer resided; that Herbert had located the engineer in the Everett House, New York city; that this engineer, not knowing anything about the heavy vein they had found, it was thought he could buy the stock at a reasonable price and it could then be sold to the company at fourteen dollars or fifteen dollars a share, and the profits could be divided between his brother and Franke. This was on March 6, 1902.

Herbert again saw Franke on the following day, whereupon Franke went to the office of the Horseshoe Copper Mining Company, but not seeing anybody, went again on the eighth. On that day he saw one "Weller," whose name appeared on the door as treasurer of the company. Weller introduced Franke to one Quealey, who was president of the company. Franke said to Quealey that he had been told that he had a controlling interest in the Horseshoe Copper Mining Company. To that Quealey said no, that he used to have a controlling interest, but when he turned over this mine to the company he was compelled to deliver it to the company free and clear of all indebtedness, and to do so he had to pay some indebtedness. To accomplish that he issued 1,000 shares of stock to one man and 2,000 to another man, a mining engineer, for services rendered; that the 1,000 shares had all been repurchased, but they were unable to locate the 2,000 shares. Franke then asked Quealey, if he (Franke) could control all or a part of those shares, at what price he was willing to purchase them, to which Quealey replied, "I buy my stock for 15 and some for 16, but I want to make something and I will offer you $14." Franke then asked Quealey if he would give a certified check at the time the shares were delivered, and he said yes; that he was not ready on that day, but would be ready on Monday to purchase the stock.

After the conversation on the eighth of March, Herbert again called on Franke, and Franke repeated the conversation that he had with

Quealey. Herbert then wanted Franke to call at the Everett House to be introduced to the engineer, and made an appointment for Franke to meet him there at four o'clock in the afternoon of Sunday, March ninth. When Franke got to the Everett House he found Herbert standing by the door who took him at once up to a room on the first floor. When they went into the room Franke found the defendant lying on a bed apparently sick. His hands were bandaged with iodine, and medicine bottles were on the table and his arms were bandaged; he had on a bath robe. Herbert introduced Franke to the defendant as an engineer by the name of Putnam, and told Putnam that Franke was willing to buy the stock. Herbert said to the defendant, "Mr. Putnam, this gentleman is intending to purchase your stock, and how much you take for them;" and to that Putnam replied that he wanted twelve dollars a share, but that he was so sick he did not care to talk business or to sign for them, and "he thinks he can get a good deal more from a man who comes from Chicago." He said he was very sick with sciatica, and was in great agony. Franke said he was sorry and did not want to trouble Putnam, as he was so very sick, and Herbert said, "No, sit down, sit down we will figure now; make a price for the stock." Franke then proposed to place these shares in a bank or with a trusted friend, and that he (Franke) would put up the amount of money, and if the thing was all right and an honest deal Putnam was to take his money and Franke the shares. Putnam said no; that he had been fooled twice already with checks; that he was a stranger here and did not want to bother with checks, and would not take anything else but money. It was then agreed that the defendant was to sell the shares for ten dollars a share. In the course of this conversation the defendant said he was an engineer, and had received this stock for services rendered as engineer to the Horseshoe Copper Mining Company.

Herbert and Franke then left the hotel, and on Monday morning Franke went to the office of the company and there saw Quealey, who said that the party for whom he was buying the stock had not yet arrived. Then Herbert again appeared and took Franke up to the Everett House to see the defendant. They arrived there about eleven o'clock on Monday, and Herbert asked the defendant

whether he had the shares with him. The defendant lifted himself up with apparently great pain and took from under the mattress two certificates of stock, one for 800 shares, the other for 1,200. Those certificates stood in the name of "Thomas Putnam," were dated September 12, 1901, and were signed by Quealey as president and Weller as treasurer of the corporation. Herbert then proposed that the defendant give an option on the whole 2,000 shares at ten dollars a share, and Franke, at the dictation of Herbert, wrote out such an option and the defendant signed it, Herbert signing as a witness.

After Franke had got that option he went back to the office of the mining company and saw Weller. Weller said that Quealey had just left, leaving word for Franke that it was all right, directing Franke to bring the shares and that he would get his money. On the following day Franke saw Herbert, repeated the conversation that he had had with Weller, but said that he could not purchase the 800 shares because he had only $4,000 and that $8,000 was required. Herbert then said he would telegraph to his brother to wire $4,000 and would telephone Franke about it. About nine o'clock that night Franke received a telephone message at his house from Herbert that he had received from his brother a telegram stating that the $4,000 had been telegraphed by the Western Union Telegraph Company.

On Tuesday, the eleventh of March, Herbert came to Franke's office and said, "Well, you draw your money and I have to go up to 23rd street to the Western Union Telegraph office with a gentleman who will identify me to receive the $4,000," and that he would meet Franke at the Everett House at about eleven o'clock. Franke thereupon drew $4,000 in bills from the bank and went to the Everett House, arriving there shortly after eleven o'clock. He met Herbert at the door. Herbert said "all right, I have got my money." They went upstairs into the defendant's room. The defendant was then in bed, dressed the same as before, still apparently very sick. Herbert asked the defendant if he had the 800 shares of the copper mining company, whereupon the defendant produced the certificate from behind the mattress, and when produced the blank assignment on the back of the certificate for 800 shares was signed by the defendant. The defendant then handed to Franke the certificate, and Herbert at the same time said, "Here

is my money and Mr. Franke will give you his money," and reached over to the defendant, apparently handing him something. Franke looked at the certificate and then handed the defendant $4,000 that he had drawn from the bank. Franke then wrote out a receipt for the money, which the defendant signed. This receipt was for the $8,000, the consideration for the 800 shares of stock.

Herbert and Franke then went down to the company's office. When they arrived there was no one in the office except a typewriter. Herbert and Franke waited an hour and over, when Herbert said it was very queer that Quealey should not be there. Franke then became very suspicious and told Herbert that he certainly would not lose sight of him. Franke and Herbert waited about three hours and Quealey did not appear. Then Herbert said he wished to go to the toilet room, took off his coat and left it on the office table. Franke wanted to go with him to the toilet room, but the typewriter said that he would not run away because his coat and hat were there; whereupon Herbert went to the toilet room, but did not return. Franke then insisted upon taking Herbert's coat, but before he took it the typewriter carefully looked through the pockets to find if he had not left something in it for her. Franke took the coat to another office in the building and left it there and went to the Everett House to look for the sick engineer. He got to the Everett House about four o'clock in the afternoon, but the defendant had gone, leaving word with the clerk that he was going to a hospital.

Franke then returned to the office of the company and met Weller, who said that he was very glad indeed that Franke had got the stock and he would transfer his stock to Franke on the books of the company. That did not seem to satisfy Franke, and he kept hold of the certificate that he had received from the defendant. He was subsequently unable to see Quealey, and Quealey never purchased the stock or produced any one that was ready to purchase it. As soon as they got the $4,000 from Franke, they lost all interest in the stock.

None of these facts were denied. The People also proved that the stock was of little or no value; that the company was not at the time in a position to purchase any stock; that no rich strike had been made. It requires only a mere statement of this story to make

it entirely clear that there was here nothing but a device to palm off this worthless stock upon Franke, or any one that would answer that advertisement, by leading him to believe that he could resell the stock to either Quealey or the company at a price in excess of that paid, when there was not the slightest intention of purchasing it. We think it entirely clear that all of the parties who took part in this scheme were guilty of grand larceny and the conviction was amply sustained by the evidence.

The defendant upon the trial objected to the introduction of the conversations between Herbert, Quealey and Weller, upon the ground that as to him they were mere hearsay, as they were not in his presence. We think the evidence was clearly admissible; that the facts showed a combination or conspiracy between these four persons to obtain Franke's money by trick and device; and the evil dence of the combination between them was so connected with the crime that the admissions or declarations of each of the co-conspirators were evidence against the defendant.

The appellant claims that the proof was not sufficient to convict the defendant of a conspiracy as defined by section 168 of the Penal Code. This was not an indictment for a conspiracy under that section, but an indictment for grand larceny; and the crime having been committed, each of the parties who were concerned in the commission of the crime, whether he directly committed the act constituting the offense, or aided and abetted in its commission, is a principal under section 29 of the Penal Code. We think the relation that each of these four persons bore to the other was sufficient to justify the court in finding as a fact that there was a combination between them to defraud Franke out of his money, and that the declarations of each were competent evidence against one of those jointly engaged in consummating the crime. It is quite probable that when some of the conversations with Herbert and Quealey were admitted the People had not then proved facts sufficient to justify the inference that the defendant was an actor in this conspiracy; but the subsequent evidence was sufficient to connect the defendant with the scheme, and his objection to the admission of the evidence became then unavailing. The rule is stated in the American and English Encyclopædia of Law (Vol. 6 [2d ed.], 869) as follows: "Although proof of the acts and declarations of an alleged co-conspirator may

not be properly admissible at the time when introduced in evidence, for the reason that community of intent and design has not been established, yet if such evidence is received, the error may be cured by the subsequent introduction of proof of the existence of the conspiracy at the time the alleged declarations were made. This is in accordance with the rule of evidence which provides that testimony which is incompetent when offered and admitted may, nevertheless, be rendered competent, and the irregularity of its admission cured by the subsequent introduction of proof which, had it preceded the evidence incompetent *pro tempore*, would have rendered such evidence properly admissible when offered."

The People also introduced in evidence a similar transaction by which these parties united in obtaining the money of another person who had also answered this advertisement, and by which Herbert, Quealey and Weller successfully employed the same methods to induce one Efinger to part with his money in the purchase of stock of this corporation. Again they produced the sick engineer; told to their victim the same story and successfully obtained from him several thousand dollars. It is true that Putnam, the defendant in this case, does not seem to have been connected directly with the transaction, but this other transaction was in progress at the same time that the defendant was disposing of his stock to Franke. The sick engineer in that case was called "Ewen H. Clark." Efinger answered this advertisement. He was waited upon by Herbert. He was introduced to Quealey and Weller by Herbert. Quealey agreed to buy his stock. Efinger purchased the stock from Clark to sell to Quealey, and as soon as he had purchased the stock and Clark had got the money the other parties to the transaction promptly disappeared. As the defendant in this case was acting as the sick engineer to get Franke's money, and as another sick engineer was needed to get Efinger's money, of course the defendant was not directly connected with that transaction; but to sustain a conviction the crime must be proved against the four parties united for that purpose; and to show the intent with which they acted it was competent to prove that, at the same time, they were pursuing a scheme of a similar character by which they succeeded in getting from another individual money by means of the same false and fraudulent statements that had induced Franke to part with his money.

It is well settled that in cases of this kind, where the fraudulent intent is an element of the crime, similar frauds of the same character and closely connected in point of time are competent evidence to show the intent with which the crime was committed; and the mere fact that they tend to prove an independent crime does not render such evidence incompetent. It is competent to show the criminal intent of the parties directly connected with the transaction which is necessary to constitute the crime. To prove the defendant guilty, the intent of the parties engaged in the combination to accomplish that purpose was an essential element of the crime; and to prove that essential element it was competent to show that at the same time the parties who had conspired together to cheat Franke were successfully conspiring to cheat another individual, using the same device. I think this evidence was clearly competent.

There are many other objections to evidence scattered through this record. We do not think any of them material, and if it could be said, strictly speaking, that some questions were objectionable, the answer to none of them could at all affect the merits of the case. This defendant was clearly guilty. No one can read this record without being thoroughly convinced that this whole transaction was a bold scheme to entrap the unwary and defraud them of their money; and, strange to say, considering the apparent fraud that was indicated all through the transaction, it succeeded.

I do not think that there was any error that would justify us in reversing the judgment, and it should be affirmed.

VAN BRUNT, P. J., PATTERSON, HATCH and LAUGHLIN, JJ., concurred.

Judgment affirmed.

KATIE HELMKEN, Respondent, v. THE CITY OF NEW YORK, Appellant.

Evidence — testimony of a physician that injuries "might recur" is incompetent — where objectionable testimony, not responsive to the question, is given, an objection to the testimony and motion to strike it out, is sufficient.

In an action brought to recover damages for personal injuries, a physician who treated the plaintiff testified that she had several bruises on her right leg and a prolapse or falling of the womb; that he treated her for this condition about eight months; that at the end of eight or nine months she was practically cured, the displacement was apparently cured. Counsel for the plaintiff then asked the witness: "Can you tell us with reasonable certainty whether this plaintiff will suffer from these injuries?" This was objected to by the defendant and the objection was overruled, when the witness said: "I decline to answer the question at all." The court then said: "Hasn't he already said that the injuries were practically cured?" to which counsel for the plaintiff answered, "Yes. Now I want to know whether there can be a recurrence of them." The court then said to the witness, "What is your answer? Can you answer that?" to which the witness replied, "I would say yes, that they might recur." Counsel for the defendant: "That I object to and move to strike out." The court: "I will leave it." To which counsel for the defendant excepted.

Held, that the evidence as to the recurrence of the injury was incompetent and necessitated the reversal of a judgment entered upon a verdict in favor of the plaintiff;

That the answer made by the witness was not responsive to the question asked by the court, and that, therefore, the defendant's failure to object to the question did not constitute a waiver of the error.

APPEAL by the defendant, The City of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 13th day of May, 1903, upon the verdict of a jury for $1,500, and also from an order entered in said clerk's office on the 27th day of May, 1903, denying the defendant's motion for a new trial made upon the minutes.

Theodore Connoly, for the appellant.

Louis Steckler, for the respondent.

INGRAHAM, J.:

There is one exception to evidence that requires us to reverse this judgment. The plaintiff, who tumbled into a manhole upon one of the streets in the city of New York, brought this action to recover

for the personal injuries sustained by her in consequence of this fall. She testified as to the result of the injury and called a physician who had attended her. He testified that when he called upon the plaintiff he found that she had sustained some injury; that she had several bruises on her right leg and a prolapse or falling of the womb; that he treated her for this condition about eight months; that at the end of eight or nine months she was practically cured, the displacement was apparently cured. Counsel for the plaintiff then asked the witness: "Can you tell us with reasonable certainty whether this plaintiff will suffer from these injuries?" This was objected to by the defendant and the objection was overruled, when the witness said: "I decline to answer the question at all." The court then said: "Hasn't he already said that the injuries were practically cured?" to which counsel for the plaintiff answered, "Yes. Now I want to know whether there can be a recurrence of them." The court then said to the witness, "What is your answer? Can you answer that?" to which the witness replied, "I would say yes, that they might recur." Counsel for the defendant: "That I object to and move to strike out." The court: "I will leave it." To which counsel for the defendant excepted.

This class of evidence has been condemned so many times by this court and by the Court of Appeals that it is unnecessary to cite the authorities. The witness had refused to say whether with reasonable certainty the plaintiff would in the future suffer from the injuries, and then counsel for the plaintiff stated that he wanted to knew whether there would be a recurrence of them, a question which was entirely improper, as merely speculative and without any basis of fact, which the jury were not justified in considering in determining the amount of damage. Counsel for the plaintiff having stated what he wanted to ascertain, the court asked the witness whether he could answer that question. This called for an answer, "Yes" or "No;" but instead of answering, "Yes" or "No," the witness said that there might be a recurrence, and counsel for the defendant then promptly objected and moved to strike the answer out. It was not responsive to the question and, therefore, a failure to object to the question did not waive the error. The evidence was entirely incompetent, and for that reason we are required to reverse the judgment.

I also think that this verdict that the defendant was guilty of negligence was against the weight of evidence. The plaintiff testified that she was walking down Catherine street, in the city of New York, and that when she got to the corner of Catherine and Henry streets she fell into a hole; that she stepped on a plate and it went right down; that before she stepped on the plate she did not notice the plate at all; that she fell down to her armpits and was rescued by two men who pulled her out of the hole; she never noticed this place before and never knew that there was anything broken or out of order in that manhole; that she did not know anything about its condition at all. Upon cross-examination she said, "As I walked along this street, as I stepped on what I said was the cover I felt the plate going down underneath me; I stepped on something and that gave way beneath me and I went down to my armpits." It is quite clear from this statement that all the plaintiff knew was that as she walked along the street she fell into the hole, but she expressly testified that she did not notice the plate at all before she fell.

Two men who were driving a truck in the neighborhood, and who pulled the plaintiff out of the hole, were first attracted to the occurrence by hearing the woman scream, when they went over and took her out of the hole and took her to a drug store. Neither of these men saw any covering to the manhole. The plaintiff also called as a witness one Mary Shea who lived in the neighborhood. She testified that she was standing near this manhole talking to a companion when she "heard a noise like somebody stumbled — fall, and I looked and there saw the woman in the manhole; * * * the cover had been cracked; it had been shaky; when I saw her I did not see her step upon the cover; * * * this manhole there at this corner in which she fell; it had been cracked but not to notice anything about it, for to say anything, * * * I noticed it had been cracked; I should judge about maybe four or five weeks; maybe it was before that; but as far as I can recollect now I did not report it; I did not think anything of it; I noticed it was shaky, and when anybody went over it, it made a kind of a noise." The witness was shown a broken cover, and she testified that she could not say whether that was the cover or not that was on the manhole. She then made a drawing of the crack in the covering, as she remembered it, and she stated that this crack started at one edge of the

cover, went in towards the center, and then back to the other rim. This was the only testimony introduced on behalf of the plaintiff as to this cover.

On behalf of the defendant the proprietor of a drug store located on the corner of Catherine and Henry streets, directly in front of the manhole into which the plaintiff fell, testified that he was at the store on the afternoon of April thirtieth, when the plaintiff was brought in by the policeman; that he remembered seeing a boy lift up this manhole cover and put it back again; that there was nothing the matter with the cover; that there was a school on the opposite corner from his store, and at all times during April, and prior to the thirtieth of April, children were playing out in the street and around the corner; that he saw the children lift the cover up the day before the accident and drop it back, the way they generally did; that the cover was whole then; that there was no crack in the cover then; that he could see a distance of fifteen feet. Upon cross-examination he testified that he could not remember seeing the boys take this cover up on the day of the accident, but remembered that as the day before was Sunday they did it a half-dozen times, and had been doing it right along; that he was sure it was not broken the day before; that he saw the boys take the cover up whole; that the boys took up the cover to get their balls which rolled down into the sewer; that this happened every day before he left the store. The defendant also called the police officers who were stationed at this locality. They testified that it was their duty to be at this corner every day at the opening or dismissal of the public school; that they stood at the corner to protect the children in crossing the street. One of the officers testified that he stood on the top of this manhole frequently; was there the day of the accident to the plaintiff when the school got out, and the cover was not broken when he was there; that it was on the sewer hole; that he stood on this particular corner, as he was then in front of the schoolhouse, and so could protect the children crossing the street; he was on that post at the time of the accident, and had been at this manhole about a half or three-quarters of an hour before the accident; that after the accident he reported that the manhole cover was gone; that he never saw this cover broken or cracked. Three other policemen, who were also upon that post, testified that they were constantly

passing over this street; that there was nothing the matter with this cover; that each of them had crossed and recrossed it many times, stood on it and walked over it, as it was in a direct line of travel up and down the street; that people walked over it all the time.

Considering the indefinite statement of the witness for the plaintiff as to the crack in the sewer cover; the undisputed evidence on behalf of the defendant, that the day before the accident, and prior thereto, the boys were in the habit of lifting this cover to get their balls which had rolled into the sewer; the testimony of the policemen whose duty it was to examine this locality and ascertain if the cover to this hole was safe; the fact that these policemen had stood upon the manhole a day or two before the accident, and had been past the locality on the day of the accident and that no defect in the cover was disclosed, it certainly cannot be said that there was a preponderance of evidence that this cover was so broken as to render it unsafe for persons using the street for any appreciable time before the accident. Assuming that it had a crack in it, as testified to by the witness for the plaintiff, for two or three weeks before the accident, there is no evidence that such crack rendered it unsafe, or that this crack was the cause of its falling when the plaintiff stepped upon it. Even if the piece that the plaintiff's witness testified was cracked was entirely broken out, it is quite apparent that the mere stepping upon such a cover would not cause it to fall, and there is no evidence to connect the fall of the cover with the fact that it was cracked, even if it could be said that the evidence of the crack was sufficient to justify the jury in finding that it existed. The evidence of this woman is extremely indefinite, both as to the time the crack existed and as to what she noticed about it. It is quite probable that when one stepped upon this cover it made some movement, or, as described by this witness, it "wabbled," but there is no evidence that such a condition made it unsafe or rendered it liable to fall when one stepped upon it, and the fact as to the boys lifting it up to get at their balls which had rolled into the sewer would account for the condition of the cover, so that when she stepped upon it in that condition it had fallen through. It is not claimed that the city would be responsible for an accident caused by the action of boys in the street in moving this cover and failing to

replace it properly. And taking all the testimony together I do not think that it was fairly proved that this cover was in a dangerous condition at any time prior to the accident or that the plaintiff's falling was caused by any negligence of the city in not keeping this portion of the street in a safe condition.

I think, therefore, that the judgment and order should be reversed and a new trial ordered, with costs to the appellant to abide the event.

McLAUGHLIN, J., concurred.

O'BRIEN, J. (concurring):

I concur on the first ground, viz., the error committed in refusing to strike out incompetent evidence.

HATCH, J., concurs.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

FREDERICK PHILLIPS, Suing on his Own Behalf and on Behalf of All the Stockholders of the SONORA COPPER COMPANY, Respondent, v. SONORA COPPER COMPANY and Others, Appellants, Impleaded with Others.

Complaint against certain corporations and individuals, alleging misrepresentations inducing the sale of some of the stock of one of the corporations, and other misrepresentations inducing stockholders of such corporation to exchange its stock for that of the other corporations, the diversion of the proceeds of the sale of the stocks, and asking for an accounting and receiver — it does not state a cause of action — when the courts will appoint a receiver of a foreign corporation.

The complaint in an action brought by Frederick Phillips, suing on behalf of himself and of all stockholders of the Sonora Copper Company, against the Sonora Copper Company, the Puertecito Copper Company and the Empire Consolidated Quicksilver Mining Company, all foreign corporations, and a number of individuals who controlled the affairs of such corporations, set forth a prospectus issued by the Sonora Copper Company, inviting subscriptions to the treasury stock of the company, together with a statement issued by the Sonora Copper Company, and alleged that certain statements in the prospectus and statement were not true; that they were issued pursuant to some fraudulent scheme for the purpose of promoting sales of the stock of the Sonora

Copper Company; that as a result of the issuance and circulation of the prospectus and of their personal efforts by solicitation and correspondence and of statements with regard to the properties of the Sonora Copper Company, the individual defendants succeeded in selling a large amount of the stock of said company to various persons. It was not alleged that the plaintiff purchased any stock in reliance upon the prospectus or upon the statements made by the company or by the individual defendants.

The complaint further alleged that the Sonora Copper Company is not now engaged in business, and "that, if the said Company now has any assets or claims of any sort of any value, there is grave reason to apprehend that said assets and claims will be dissipated and lost unless cared for by some persons other than the defendants;" that the individual defendants had, by certain false and fraudulent representations, succeeded in inducing certain stockholders of the Sonora Copper Company to exchange their stock for stock of the Puertecito Copper Company and of the Empire Consolidated Quicksilver Mining Company and were now engaged in persuading other stockholders of the Sonora Copper Company to do so; that all these wrong and fraudulent acts had been done in pursuance of some conspiracy to defraud the stockholders of the Sonora Copper Company. It was not alleged that any of these false and fraudulent statements had deceived the plaintiff, or had caused him any injury or had affected the value of his stock.

The complaint further alleged that large sums of money were obtained by the individual defendants from the sale of the stock of the Sonora Copper Company; that such money had been diverted from the use of the Sonora Copper Company and had been delivered to the other defendant corporations, and that all of the assets of the Sonora Copper Company were in the possession of the other defendants without right or authority. It was not alleged that the stock so sold was the stock of the Sonora Copper Company or that the defendants had misappropriated or misapplied any of the money or property of the Sonora Copper Company, or that that corporation ever owned or sold a share of its own stock or ever had any property of any kind.

The complaint further alleged that the individual defendants were not fit persons to have charge of the affairs of the defendant corporations and that they ought to account to the Sonora Copper Company for all assets of said company which have been turned over to them, as alleged or otherwise.

The relief demanded was that a receiver be appointed for the defendant, the Sonora Copper Company; that the individual defendants account to such receiver for the sums of money obtained by them from the sale of the stock of the Sonora Copper Company; that the defendant corporations, other than the Sonora Copper Company, pay to such receiver the sums received by the individual defendants from the sale of the stock of the Sonora Copper Company to the extent that such defendant corporations have received such money from the individual defendants, and that the Puertecito Copper Company account to the receiver for such assets of the Sonora Copper Company as it had received.

Held, that the complaint did not state facts entitling the plaintiff to any relief.

While the courts of the State of New York will, under certain circumstances, appoint a receiver of a foreign corporation when necessary for the protection of the stockholders or creditors of the corporation, they will not appoint a receiver of a foreign corporation simply because of general allegations of misconduct on the part of the directors or officers thereof.

APPEAL by the defendants, Sonora Copper Company and others, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 25th day of April, 1903, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the said defendants' demurrers to the plaintiff's complaint.

J. C. Thomson, for the appellants.

Harry S. Bandler, for the respondent.

INGRAHAM, J.:

It is somewhat difficult to ascertain from this complaint just what was attempted to be alleged. The defendants, the Senora Copper Company and the Puertecito Copper Company, are foreign corporations existing by virtue of the laws of the State of Delaware; and the defendant, the Empire Consolidated Quicksilver Mining Company, is a foreign corporation organized and existing under the laws of the State of New Jersey; and the individual defendants are alleged to control and handle the affairs of these corporations. The defendant Hallenborg is the treasurer of one copper company and the secretary and treasurer of the other copper company. There are other allegations scattered through the complaint which would seem to indicate that these defendants, or some of them, are also directors of one or more of these companies, although I cannot find that that fact is directly alleged. The complaint then sets out a prospectus that was issued by the Sonora Copper Company which invited subscriptions to a limited number of shares of the treasury stock of the company at eight dollars per share, alleging that this prospectus was signed by one Costello as vice-president, and by the defendant Hallenborg as treasurer of the Sonora Copper Company. There is then set out a statement issued by the Sonora Copper Company; and this prospectus and statement are alleged to have been issued and circulated pursuant to some fraudulent scheme for the purpose

of promoting sales of stock of the Sonora Copper Company, and that certain statements in this prospectus and statement are not true. It is then alleged that as a result of the issuance and circulation of this prospectus, notwithstanding the falsity thereof, and as a result of their personal efforts by solicitation and correspondence, and by making statements with regard to the properties of the Sonora Copper Company of the nature set out in the foregoing prospectuses, the individual defendants succeeded in selling at various prices a large amount of the stock of said company to various persons in different localities in the United States.

From this allegation it would appear that it was the individual defendants that sold the stock, and not the corporation; but it is not alleged that the plaintiff purchased any stock relying upon the statements of this prospectus, or in the statements made by the companies or the individual defendants.

The plaintiff then alleges that the Sonora Copper Company is not now engaged in business, and "that if the said Company now has any assets or claims of any sort of any value, there is grave reason to apprehend that said assets and claims will be dissipated and lost unless cared for by some persons other than the defendants;" that the individual defendants are connected with or are interested in the other corporate defendants and have circulated information among the stockholders of the Sonora Copper Company residing in the States of Vermont and New York to the effect that the assets of the Sonora Copper Company have been turned over to the Puertecito Copper Company and that they have informed the stockholders of the Sonora Copper Company in Kentucky that the Empire Consolidated Quicksilver Mining Company possessed the assets of the Sonora Copper Company, and said defendants have endeavored to induce the stockholders of the defendant Sonora Copper Company to exchange their stock for that of the said the Puertecito Copper Company and Empire Consolidated Quicksilver Mining Company; and for the purpose of preventing criticism of and inquiry into and action upon their acts in relation to these corporations, they are endeavoring to bring about such transfers, although there is no allegation that they have endeavored to or have succeeded in deceiving this plaintiff. It is also alleged that they are engaged in deceiving and tricking persons to purchase stock of the Sonora Copper

Company in the manner before alleged; that the defendants, acting in pursuance of their false and fraudulent scheme to obtain money from the public and to turn over any assets of the Sonora Copper Company to the defendant, the Puertecito Copper Company, or the Empire Consolidated Quicksilver Mining Company, and for the purpose of preventing an investigation by the stockholders of the Sonora Copper Company, with respect to their said deceitful and wrongful acts, caused and permitted to be issued and uttered to the stockholders of the Sonora Copper Company, resident in Kentucky, statements that said company had gone out of the copper mining business, and that there had been organized a quicksilver mining company; and that the assets of the Sonora Copper Company were held by the Empire Quicksilver Mining Company; that as a result of said statements and representations certain of the stockholders of the Sonora Copper Company, residing in Kentucky, were induced to exchange their stock in the Sonora Copper Company for stock in the Empire Consolidated Quicksilver Mining Company at par; that for the same purpose similar representations were made to stockholders of the Sonora Copper Company in Vermont and New York, and that by said statements various stockholders of the Sonora Copper Company were induced to exchange their stock for stock in the Empire Consolidated Quicksilver Mining Company. It is further alleged that the individual defendants have made other representations about these companies which are all alleged to be false and untrue; and that by reason of all of these false and untrue statements they are now engaged in persuading the stockholders of the Sonora Copper Company to exchange their stock for stock of the other companies, and that all of these very wrongful and fraudulent acts have been done in pursuance of some conspiracy to defraud the stockholders of the Sonora Copper Company. But it is not alleged that any of these false and fraudulent statements and representations have at all deceived the plaintiff or have caused him any injury, or have affected the value of the stock held by him. It is then alleged that large sums of money were obtained by the individual defendants from the sale of the stock of the Sonora Copper Company, but that said sums of money have been diverted from the use of the Sonora Company and have been delivered over to the other defendant cor-

porations, and that all of the assets of the Sonora Company are in the possession of the other defendants without right or authority and to the ends and purposes of the defendants herein other than the Sonora Copper Company. But it is not alleged that the stock so sold was the stock of the Sonora Company, or that the defendants have misappropriated or misapplied any of the money or property of the Sonora Copper Company.

It is difficult to understand just what relation all of these alleged false and fraudulent representations as to the condition and affairs of these various defendant corporations have to do with any cause of action which the plaintiff, suing on behalf of himself and all other stockholders, can enforce. Just what disposition was made of the stock of this company by its various stockholders, whether it was exchanged or sold, is no concern of the plaintiff as a stockholder. It could make no difference to him who the other stockholders are, or how much they have been affected by the frauds of the individual defendants, as long as he has sustained no injury by their acts. Nor does it appear how the acts of the various stockholders of the Sonora Copper Company in disposing of their stock or exchanging their stock could affect the Sonora Copper Company. If these individual defendants have sold their own stock, or other people's stock, and realized large sums of money for it, so far as is alleged, they were under no obligation to turn the proceeds of that stock over to the Sonora Company or to other of the corporations. If they sold stock belonging to the Sonora Copper Company and misappropriated the proceeds, there would be a cause of action in favor of the company against them, and such cause of action might, under certain conditions, be enforced by a stockholder suing on behalf of himself and all other stockholders. But I fail to find in this complaint any allegation that would sustain such a cause of action, as there is no allegation that the corporation ever owned a share of its own stock, ever sold a share of it, or that these individual defendants have ever received a share of the stock of the company which had belonged to it, or which it had sold. The general allegation that all the assets of the Sonora Copper Company, such as they may be, are in the possession of these other defendant corporations and are being diverted from the said corporation without right or authority, is not

sufficient to sustain a cause of action, as there is no allegation that the Sonora Copper Company has or ever had any property of any kind. All that the complaint alleges is that, if it ever had any property in its possession of the other corporations, it has been diverted. Certainly such an allegation cannot be seriously considered as giving a cause of action.

The complaint then goes on to detail a proceeding which the plaintiff through his attorney, Anthony Higgins, Esq., of Wilmington, Del., brought in the courts of the State of Delaware; but just what this has to do with any claim that the plaintiff can enforce in the courts of this State is not perceived; nor does it appear just what the mandamus alleged to have been issued by the Superior Court of the State of Delaware, directing the Sonora Copper Company to file a certificate in the office of the Secretary of State, and stating the amount of installments or calls of capital paid, has to do with the complaint that the plaintiff makes against these defendants.

Having alleged all of these fraudulent and wrongful acts of these defendants, the plaintiff alleges upon information and belief that the individual defendants are not fit persons to have charge of any affairs or property of the defendant corporations, and that they ought to account to the Sonora Copper Company for all assets of said company which have been turned over to them, as alleged or otherwise. But as I fail to find any allegation that the Sonora Copper Company ever had any property, or ever turned any over to the individual defendants, there does not seem to be any substance in this allegation.

The plaintiff, then, upon these allegations, asks, *first*, that a receiver be appointed for the defendant, the Sonora Copper Company. As the said company is a foreign corporation, organized under the laws of the State of Delaware, it would appear that any application to appoint a receiver of that corporation should be made in that State. While the courts of this State will, under certain circumstances, appoint a receiver of the property of a foreign corporation in this State, when necessary for the protection of the stockholders or creditors of the corporation, I know of no authority which justifies the courts of this State in appointing a receiver of a foreign corporation because of general allegations of misconduct on the part of the directors or officers.

The *second* relief that the plaintiff asks is that the individual defendants account to the receiver of the Sonora Copper Company to be appointed for the sums of money obtained by them from the sale of the stock of the Sonora Copper Company. Just why the individual defendants should account to the Sonora Copper Company is not apparent, as it is not alleged that the company is insolvent or has any creditors, that these individual defendants have any property of the company in their hands, that the company ever had any stock in its possession, or that any stock belonging to the company had ever been sold.

The *third* relief to which the plaintiff considers himself entitled is that the defendant corporations, other than the Sonora Copper Company, pay over to the receiver of the Sonora Copper Company the sums of money received by the individual defendants from the sale of the stock of the Sonora Copper Company to such extent as the said Puertecito Copper Company and the Empire Consolidated Quicksilver Mining Company have received the same from the individual defendants, and that the Puertecito Copper Company account to the receiver for such assets of the Sonora Copper Company as they have received. But for the same reasons it is quite apparent that upon the facts alleged the plaintiff could not be entitled to this relief.

The learned judge at Special Term, in overruling this demurrer, seems to have found some allegation in the complaint which charges the individual defendants with selling and misappropriating the treasury stock of the Sonora Copper Company, but I have been unable to find any such allegation. The only statement in the complaint that the Sonora Company ever had any stock is that contained in what is called the "prospectus," by which it is said that "subscriptions are invited at $8.00 per share to a limited number of shares of the Treasury Stock of the Sonora Copper Company," but a large part of the complaint is taken up with allegations of the falsity of this prospectus, and the cause of complaint that this plaintiff seems to have is, that this prospectus and the statement prepared by the company are false and fraudulent. But it cannot be said that an allegation that such a prospectus was issued is an allegation that the company ever had any treasury stock. Counsel for the plaintiff seems to base his claim that this complaint alleges that the Sonora Copper Company had some stock which was sold by

the defendants, upon the allegation that the Sonora Copper Company had no assets except moneys received from the sale of its shares as alleged, and claims against the defendants herein growing out of the receipt by the various defendants of moneys, being the proceeds of said shares as sold. But an allegation that a corporation had no property, except moneys received from the sale of its shares, is not an allegation that it had money so received.

This complaint is an extreme example of a method of pleading that has become too common. Allegations are jumbled together, having no relation to each other, uniting statements of fact with conclusions of fact and conclusions of law, without any relation to one distinct cause of action which is sought to be enforced, and then trying to sustain the complaint when its sufficiency is attacked by picking out independent allegations which have no particular relation to each other, and claiming that a good cause of action is established because such allegations, if properly pleaded, would be a sufficient foundation for calling upon the defendants to answer, but in such a case we should at least have in some portion of the complaint a specific allegation of the facts which are necessary to sustain such a cause of action as the plaintiff claims he has alleged, and the complaint should not be sustained where it is impossible to pick out distinct statements of fact which, taken together, are sufficient to entitle the plaintiff to some relief. I think the complaint fails in this particular; that no fact is alleged which would justify the court in awarding to the plaintiff any relief in the form of action which he has brought, and that for that reason the demurrer should be sustained.

It follows that the interlocutory judgment appealed from is reversed, with costs, and the demurrer sustained, with costs, with leave to the plaintiff to amend his complaint within twenty days, upon payment of costs in this court and in the court below.

VAN BRUNT, P. J., O'BRIEN, McLAUGHLIN and HATCH, JJ., concurred.

Interlocutory judgment reversed, with costs, and demurrer sustained, with costs, with leave to plaintiff to amend complaint within twenty days on payment of costs in this court and in the court below.

EMANUEL STEINHARDT and SIMON STEINHARDT, Appellants, v. DAVID BINGHAM and ARTHUR N. BINGHAM, Respondents.

Sale of merchandise — what is insufficient proof of the mailing of a letter of advice of its shipment.

Where a contract for the sale of corn requires the vendors to "furnish to buyers steamer's name and quantity loaded within five days of date of Bill of Lading," which was April 24, 1897, testimony of an employee of the vendors that he dictated a letter dated April 27, 1897, and signed it; that he inclosed the original invoices covering the shipments; that he did not know whether he mailed the letter or not; that he inclosed it in an envelope and placed the letter, after it was inclosed in the envelope, in the mailing box in his office, is insufficient to establish that the letter was mailed within five days of the date of the bill of lading.

APPEAL by the plaintiffs, Emanuel Steinhardt and another, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 19th day of June, 1903, upon the dismissal of the complaint by direction of the court after a trial at the New York Trial Term.

A. Blumenstiel, for the appellants.

Jacob F. Miller, for the respondents.

INGRAHAM, J.:

When this case was before this court on the former appeal, it appeared without dispute that the plaintiffs had advised the defendants in writing of the steamer's name and the quantity of corn loaded, within five days of date of bill of lading by mailing a letter from New Orleans on April 27, 1897, which was a compliance with the contract as we construed it. (53 App. Div. 286.) Upon this trial I do not think that there was a substantial change of the proof that would affect the construction of the contract; but the plaintiffs failed to prove that they mailed the letter which furnished the information required within five days from the date of the bill of lading. The only evidence on that point was the testimony of the witness Stratton, who was the manager of the plaintiffs' grain department. He testified that he dictated a letter dated April 27, 1897, and signed it; that he inclosed the original invoices covering the shipments; that he did not know whether he mailed the letter or not; that he inclosed it in an envelope and placed the letter, after

it was inclosed in the envelope, in the mailing box in his office. The bill of lading was dated April 24, 1897, and the contract required that plaintiffs should "furnish to buyers steamer's name and quantity loaded within five days of date of Bill of Lading." The defendants refused to accept the corn on the ground that plaintiffs had not complied with this provision of the contract.

At the end of plaintiffs' case defendants moved to dismiss the complaint, one of the grounds being that there was no proof that plaintiffs furnished to the defendants the steamer's name and quantity loaded within five days of date of bill of lading, and no proof of the mailing of such notice within such time. This motion was denied, and defendants excepted. One of the defendants then testified that the first notice that defendants had of the shipment was the presentation on September 30, 1897, of the draft drawn on defendants by the plaintiffs for the contract price of the shipment; that defendants refused to pay the draft and telegraphed and wrote plaintiffs of such refusal, basing it upon the ground that notice of shipment had not been given as required by the contract; that he had not received the letter of April twenty-seventh on April thirtieth or earlier; that he did not know when it was received. A clerk of the defendants testified that he did not recollect receiving the letter of April twenty-seventh; that he thought the invoices were in the defendants' office on the first of May.

At the end of the case the defendants renewed the motion to dismiss upon the same ground, which motion was granted. I think that this was entirely insufficient to prove that the letter of April twenty-seventh was mailed within five days of the date of the bill of lading, and for that reason I think the plaintiffs failed to show a compliance with this contract, and that the complaint was properly dismissed.

The judgment should, therefore, be affirmed, with costs.

McLaughlin and Hatch, JJ., concurred; O'Brien, J., concurred in result.

Van Brunt, P. J.:

I concur in result only. I adhere to opinion expressed on former appeal.

Judgment affirmed, with costs.

CHARLES L. RATHBORNE, Respondent, *v.* EDWARD HATCH, Appellant. (No. 1.)

Evidence — entries from memoranda, made at the stock exchange, as to the purchase and sale of stocks — when competent.

In an action brought by a stockbroker to recover a balance of account, alleged to be due from a customer on account of the sale and repurchase of certain stocks for the customer, the only question was as to the prices at which the stocks had been sold and were subsequently repurchased.

It appeared that the sales and purchases were made by the plaintiff himself on the floor of the stock exchange. The plaintiff was unable to remember the exact prices, but testified that at the time of the several transactions he made a memorandum correctly stating the terms thereof; that he handed this memorandum to his clerk upon the floor of the stock exchange to be telephoned by the clerk to the plaintiff's office and there entered upon his books.

The clerk who received the memoranda from the plaintiff, testified that in each instance he correctly transmitted the contents thereof over the telephone to a clerk in the plaintiff's office; that the original memoranda were subsequently compared with the entries in the books and that in all cases the entries were correct.

The clerk in the plaintiff's office testified that he received the contents of the memoranda from the stock exchange; that he made entries in the books in accordance with the messages received; that he subsequently, in each case, saw the memoranda made by the plaintiff and compared them with the entries in the books, and that they were correct; that the memoranda were subsesequently destroyed.

Held, that the entries thus made in the plaintiff's books were competent evidence of the transactions which they represented, not merely as entries in the books, but as an extension of the testimony of the witness who made the memoranda from which these entries were made and who testified to their correctness.

Declarations or statements of a party are not ordinarily admissible as evidence on behalf of such party. Where, however, a party at the time of the transaction, in the ordinary course of his business, makes an entry or memorandum of a fact and he is able to testify that he made that entry at the time, and that it was a correct statement of that fact, but that in consequence of the lapse of time he is unable to testify from independent recollection to the details shown by such an entry, the entry itself is admissible as an extension of the witness testimony, its correctness having been proved.

APPEAL by the defendant, Edward Hatch, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 21st day of May, 1903, upon the decision of the court rendered after a trial at the New York Trial Term, a jury having been waived.

Edward W. S. Johnston, for the appellant.

George E. Morgan, for the respondent.

INGRAHAM, J.:

The complaint alleges that between the 1st day of January, 1899, and the 10th day of March, 1900, the firm of C. L. Rathborne & Co., at the request of the defendant, and upon his promise to pay them for their services in his behalf, bought and sold for and on his account at various times 900 shares of the capital stock of the Northern Pacific RailwayCompany and 200 shares of the capital stock of the Chicago, Burlington and Quincy Railroad Company and that said firm of C. L. Rathborne & Co. paid out and advanced, for and on behalf of the defendant on such transactions had with him as aforesaid, and upon his promise to repay the same with interest, at various times large amounts of money, which, together with the commissions earned for services performed upon such transactions, amounted, with interest, upon the 9th day of March, 1900, to the sum of $17,155.78, for which the plaintiff demands judgment.

The answer, after a denial of any knowledge or information sufficient to form a belief as to each and every allegation in the complaint contained, except demand and non-payment, alleges that prior to the times alleged in the complaint the said firm of C. L. Rathborne & Co. entered into an agreement with the defendant, wherein and whereby C. L. Rathborne & Co. agreed, without deposit or margin of the defendant, to deal in for defendant shares of the capital stock of companies whose shares were dealt in on the New York Stock Exchange, the same to be thereafter delivered or received by the defendant, and that thereafter the defendant authorized said firm to sell short, to be thereafter delivered for defendant, certain stock, to wit, 900 shares of the capital stock of the Northern Pacific Railway Company and 200 shares of the capital stock of the Chicago, Burlington and Quincy Railroad Company; and further alleges that the plaintiff or said firm, "without the consent, authority or knowledge of defendant and without notice of their intention so to do, and without demand upon defendant for 900 shares of said capital stock of said Northern Pacific Railway Company and 200 shares of the capital stock of the Chicago, Burlington and Quincy Railroad Company, purchased or claimed

to have purchased 900 shares of said capital stock of said Northern Pacific Railway Company and 200 shares of said capital stock of the Chicago, Burlington and Quincy Railroad Company, at a price much higher than the prices at which said alleged firm of C. L. Rathborne & Company had sold short said 900 shares of said capital stock of said Northern Pacific Railway Company and 200 shares of the capital stock of said Chicago, Burlington and Quincy Railroad Company," and thereafter notified the defendant that they delivered 900 shares of the said stock to the purchaser to whom they had sold said stock short, and such purchase and delivery were without the consent, knowledge or authority of the defendant and without previous notice of their intention so to do to the defendant, and without a previous demand upon the defendant for said shares of stock. The answer further alleges as a counterclaim that by virtue of the violation of their agreement by said C. L. Rathborne & Co. the defendant sustained damage in the sum of about $16,000.

The case came on for trial at Trial Term. A jury was waived, whereupon the court found that in or about the month of November, 1898, the defendant employed the firm of C. L. Rathborne & Co. to sell for his account and risk 900 shares of the capital stock of the Northern Pacific Railway Company and 200 shares of the capital stock of the Chicago, Burlington and Quincy Railroad Company, representing at such time that he had the aforesaid shares of stock in his possession and would upon demand deliver the same to the said firm, and agreed to pay said firm for their services in that behalf the usual commissions; that "thereafter the said firm of C. L. Rathborne & Company in pursuance of such employment sold for the account and risk of the defendant nine hundred shares of the capital stock of the Northern Pacific Railway Company and two hundred shares of the capital stock of the Chicago, Burlington and Quincy Railroad Company, and after such sale was made as aforesaid, repeatedly called upon the defendant to deliver said shares of stock and repeatedly warned him that in case of his failure to so deliver such shares that said firm would buy said stock and close out the account, and that said defendant having failed to deliver such stock in pursuance of his agreement so to do, said firm purchased said stock and paid therefor for the account of the defendant and closed out his account and notified defendant

thereof;" that "in and by the above mentioned transactions the said firm of C. L. Rathborne & Company advanced and paid out for and on account of the defendant herein including their commissions at the aforesaid rate, and upon defendant's promise to pay the same, the sum of $17,084.49, of which amount they received the sum of $1,109.49," leaving the balance due from the defendant of $15,975, for which judgment was awarded against the defendant. There was evidence to sustain these findings, and upon the facts as found it is clear that the plaintiff was entitled to judgment.

The only question presented upon this appeal is as to the rulings of the court admitting the entries in certain books of account kept by the plaintiff's assignors as evidence against the defendant. The answer to which attention has been called admits that the plaintiff's assignor was employed by the defendant to sell these stocks mentioned, and the plaintiff testified to repeated demands upon the defendant to deliver to him the stock that had been sold at the defendant's request for his account, so that they could be delivered in accordance with such contract of sale, and that the defendant had refused to deliver the stock; and the only question then was as to the prices at which the plaintiff's assignor had sold the stock and had subsequently purchased it for the account of the defendant.

The plaintiff was called and testified that he was a member of the New York Stock Exchange and represented his firm upon the floor of that exchange; that the defendant told the plaintiff that he had 900 shares of stock of the Northern Pacific Railway Company and 200 shares of the capital stock of the Chicago, Burlington and Quincy Railroad Company in his box, and if the plaintiff would commence selling it, if it went down he would buy it in and if it went up he would deliver the stock; that on the following day the plaintiff sold his stock according to this order; that these transactions were had on the floor of the Stock Exchange; that the witness could not remember the exact prices at which he sold the stocks; that they were sold on the exchange at the current market rates prevailing on the day of the sale; that he made a memorandum of the transaction and the prices and handed it to his telegraph operator; that the memorandum that he made was a correct memorandum of the actual transaction; that he delivered that memorandum to a clerk named Elliott, whose duty it was to report the con-

tents of the memorandum to the plaintiff's office by telephone; that he did in fact deliver in respect to each of these transactions a memorandum of such transactions to this clerk, and that such memorandum was correct; that after he had sold this stock he had several further interviews with the defendant at which the defendant was requested to deliver the stock, and that the plaintiff told him if he did not the plaintiff would be obliged to buy it in; that the defendant did not deliver the stock, or any of it; that subsequently the plaintiff bought the stock in at the New York Stock Exchange at the current market rate on the Stock Exchange on the day that it was bought; that he did not remember the price at which he bought it; that when he bought it he made a memorandum of such purchase and delivered it to his clerk in the same manner as he had testified as to the memorandum which he made when he sold the stock; that the memoranda were correct memoranda of the transactions and contained the prices at which the stock was actually bought in; that a clerk of the plaintiff's at the times of these transactions, named Kilpatrick, kept the books in which were entered these transactions; that Elliott, who was the plaintiff's clerk in the Stock Exchange, was the clerk during the entire period covered by these transactions, and that there were telegraphic communications upon the Stock Exchange from the plaintiff's office; that subsequent to this transaction the plaintiff had an interview with the defendant at which the defendant said that if the plaintiff would give him two months he would pay — he acknowledged it and said he would pay the entire amount of the debt; that subsequently the plaintiff wrote a letter to the defendant stating that the two months were up and asked the defendant to give him some cash and notes for the account. This letter was written on July 17, 1900, and in reply to that the defendant wrote to the plaintiff a letter as follows: "Your letter of yesterday at hand and while it finds me with my matters in better shape than when I saw you last, still I am not in a position to settle my account with you. I know you are put to a great deal of annoyance and inconvenience through my delay in settlement, but I am making every effort possible to fix it up."

Elliott, the plaintiff's telephone clerk upon the floor of the exchange, testified that he was employed in the fall of 1898 and 1899 by the plaintiff's assignor on the exchange end of the private

telephone; that the plaintiff was a member of the firm; that the witness' duty as clerk was to receive orders over the wire, give them to Mr. Rathborne and as he executed them he would hand the witness a written report which the witness would telephone to the office; that he would keep the written memorandum given to him by the plaintiff and either send it to the office or bring it over at three o'clock; that the memoranda were in the handwriting of the plaintiff; that the witness correctly transmitted these memoranda by telephone to the office of the plaintiff in all instances; that he had no recollection of any sales or purchases of stock made for the account of the defendant; nor did the witness recollect the prices of any of these stocks, but he correctly transmitted such as he received over the telephone to the office of the plaintiff; that the person who answered him at the office of the plaintiff was Arthur Kilpatrick, a Mr. Young or a clerk named Graham; that in every instance when the witness called up the office either one of these three people answered the witness; that the witness could recognize their voices over the telephone so that he could state which one was answering him; that the entries in the book made by the clerk who received messages over the telephone were compared with the memoranda when the witness got to the office; that in all cases the witness telephoned first and telephoned it correctly, and afterwards he sent or took over the memoranda to the office.

Kilpatrick testified that in 1898 and 1899 he was employed by the plaintiff; that his duty in the office was to receive reports over the telephone, enter them in the purchase and sales books and when the reports were taken over during the day, or at three o'clock, he compared the reports with the purchase and sales book so as to see that they were accurate, so as to avoid all mistakes; that he received over the telephone the reports of purchases and sales from the Stock Exchange, and that when he so received them he immediately and correctly entered them in the books; that the books shown to the witness were in use by the firm on November 11, 1895; that an entry on November 18, 1898, was in the handwriting of the witness; that he made that entry in consequence of a receipt of a message over the telephone; that he transcribed that message in the book, and that it was a correct transcript of the message which he received; that he afterwards saw a memorandum in the handwriting of the

plaintiff to the same effect as that entry and he compared it with that entry and it was correct.

Plaintiff's counsel offered this entry in evidence as a memorandum made by the witness of the transaction, which he knew at the time. That was objected to by the defendant, the objection overruled, to which the defendant excepted. That entry was as follows: "Sold on November 16th, 1898, to L. E. Harker, 100 Northern Pacific, 41 1-8 R. E. F. H."

The other sales and purchases of this controversy were proved by similar entries in the book made in the handwriting of the witness, and as to which there was similar testimony. These memoranda were subsequently destroyed; and the only question in this case is whether this evidence was competent as against the defendant.

Upon a former trial of this case these entries were admitted in evidence, and because of this admission the judgment was reversed. (80 App. Div. 117.) Upon that trial the plaintiff's clerk (Elliott) upon the floor of the Stock Exchange was in court, but was not called as a witness, and in reversing that case Mr. Justice LAUGHLIN, delivering the opinion of the court, says: "We are of opinion that the reception of these account books was error, and there being no other basis for the recovery, the judgment cannot stand. If it appeared that the broker who made the sales was unable to recollect the terms thereof, but had examined the entries made in the books at a time when he did recollect the figures so that he knew that the entries were correct, and also that an examination of the books would not refresh his recollection so as to enable him to testify as to the figures, or if the telephone clerk had been sworn and testified that he transmitted the information to the bookkeeper correctly as he received it from the broker, then doubtless the books would have been competent evidence in connection with the other testimony to show the essential facts."

Upon this trial this evidence was supplied and we have now the testimony of the broker who made the transactions that he made them at the regular price; that he immediately made a memorandum correctly stating the terms of the transaction, including the price of the stock sold and the person to whom it was sold; that he handed this memorandum to his clerk upon the floor of the

Stock Exchange to be transmitted to his office to be entered upon its books. We have the testimony of the clerk who received these memoranda, who testified that he received memoranda of sale made by the plaintiff; that in every instance he transmitted the contents of the memoranda correctly over the telephone to a clerk in the plaintiff's office; that he subsequently compared the original memoranda with the entries in this book and that in all cases the entries were correct. We have then the evidence of the clerk in the plaintiff's office who testified that he received the contents of the memoranda from the Stock Exchange; that he entered the purchases and sales correctly in the book according to the messages received; that he subsequently in each case saw the memorandum made by the plaintiff and compared it with the entry in the book, and that it was correct, and the memoranda were subsequently destroyed.

We think that upon this evidence the entries were competent evidence of the transactions which they represented, not merely as entries in the books, but as an extension of the testimony of the witness who made the memoranda from which these entries were made, and who testified to their correctness. If the memoranda made at the time, stating the terms of the purchases and sales of the stock that the plaintiff had made upon the Stock Exchange, had been produced, with his testimony that in consequence of the lapse of time he was unable to remember the actual amount at which the stock had been sold and subsequently purchased, there could have been no doubt but that the memoranda would have been competent evidence as a statement by the witness of the prices at which the stocks had been purchased and sold and the persons with whom the transactions were had. The books that were produced were merely copies of these memoranda. The substantial statements upon the memoranda had been simply copied into the books, and the evidence was sufficient to justify a finding that the entries were correct copies of the memoranda made by the plaintiff at the time of the transaction.

While it is a general rule that declarations or statements of a party are not admissible as evidence on his own behalf, there are exceptions made necessary by the situation, and one exception that is generally recognized is that where a party at the time of the

transaction, in the ordinary course of his business, makes an entry or memorandum of a fact and he is able to testify that he made that entry at the time and that it was a correct statement of that fact, but that in consequence of the lapse of time he is unable to testify from independent recollection of details shown by such an entry, the entry itself is admissible as an extension of the witness' testimony, its correctness having been proved. These entries in the books of original entry, made directly from the memoranda made by the plaintiff, are copies of the memoranda, and are admissible as secondary evidence, the memoranda themselves having been destroyed.

The admissibility of entries of this kind was discussed in the case of *Mayor, etc., of N. Y.* v. *Second Ave. R. R. Co.* (102 N. Y. 572). Upon determining that evidence of this character was competent, Judge ANDREWS said: "But combining the testimony of Wilt and the gang foremen, there was, *first*, original evidence that laborers were employed, and that their time was correctly reported by persons who had personal knowledge of the facts, and that their reports were made in the ordinary course of business, and in accordance with the duty of the persons making them, and in point of time were contemporaneous with the transactions, to which the reports related, and *second*, evidence by the person who received the reports, that he correctly entered them as reported, in the time-book, in the usual course of his business and duty. It is objected that this evidence taken together, is incompetent to prove the ultimate fact, and amounts to nothing more than hearsay. If the witnesses are believed, there can be but little moral doubt that the book is a true record of the actual fact. * * * The question arises, must a material, ultimate fact be proved by the evidence of a witness who knew the fact and can recall it, or who, having on personal recollection of the fact at the time of his examination as a witness, testifies that he made, or saw made, an entry of the fact at the time, or recently thereafter, which on being produced, he can verify as the entry he made or saw, and that he knew the entry to be true when made, or may such ultimate fact be proved by showing by a witness that he knew the facts in relation to the matter which is the subject of investigation, and communicated them to another at the time, but had forgotten them, and supplementing this testimony by that

of the person receiving the communication to the effect that he entered at the time, the facts communicated and by the production of the book or memorandum in which the entries were made. The admissibility of memoranda of the first class is well settled. They are admitted in connection with, and as auxiliary to the oral evidence of the witness, and this whether the witness, on seeing the entries, recalls the facts, or can only verify the entries as a true record made or seen by him at, or soon after the transaction to which it relates." The opinion then proceeds: "We are of opinion that the rule as to the admissibility of memoranda may properly be extended so as to embrace the case before us. * * * We think entries so made, with the evidence of the foremen that they made true reports, and of the person who made the entries that he correctly entered them, are admissible."

This would seem to be a direct authority for the admission of this evidence, and with this evidence in the record there can be no doubt but that the plaintiff sold and purchased the stock upon the day named and at the price named for account of this defendant. To allow the defendant to escape responsibility for an indebtedness which he has in fact conceded, and promised again and again to pay, simply because from the lapse of time and the inability of the plaintiff to remember the exact price at which he sold and purchased these shares of stock, when the facts are proved to the satisfaction of any one, would be a denial of justice. Other questions that appear on the record do not require notice.

It follows that the judgment appealed from must be affirmed, with costs.

Van Brunt, P. J., O'Brien, McLaughlin and Hatch, JJ., concurred.

Judgment affirmed, with costs.

Charles L. Rathborne, Appellant, v. Edward Hatch and Others, Respondents. (No. 2.)

Insurance policy — an imperfect assignment thereof by a wife entitled to the amount thereof in case she survives her husband — action to compel her and her husband to execute papers necessary to make such assignment effective — consideration sufficient to support the assignment.

Edward Hatch employed one Rathborne, a stockbroker, to sell a quantity of stock for him, stating that if the stock increased in price he would furnish it to Rathborne for delivery. Rathborne sold the stock and obtained it from a third person for delivery to the purchaser. The stock advanced in price, but Hatch, although requested to deliver it to Rathborne, failed to do so. The latter then had an interview with Hatch's wife, who requested Rathborne "not to do anything until her husband got well, that he was ill in bed. She said she would send this insurance policy as collateral, as it were, to the account. She said she would assign it, and she said that whether Mr. Hatch lived or died, the account would be paid." Subsequently Rathborne received a letter, written by a third party, inclosing the policy of insurance and the following instrument:

"I hereby agree to collect and pay over to Mr. C. L. Rathborne, Policy No. 358374 in the North Western Mutual Life Insurance Co. drawn in my favor.

"JESSIE BOYD HATCH."

Rathborne accepted the policy and the accompanying instrument and retained it. Subsequently, Hatch having failed to deliver the stock in pursuance of his agreement, Rathborne was obliged to buy the stock for Hatch's account, leaving a balance due from Hatch which he neglected to pay.

Rathborne then demanded payment by the insurance company of the cash surrender value of the policy, but the insurance company refused to comply with this demand because of the informality of the assignment thereof. Rathborne thereupon brought an action to compel Hatch and his wife to assign to him all their interest in the policy, and to execute such further instruments of assignment and conveyance as would enable him to collect the cash surrender value thereof.

The policy provided that the insurance company would pay "unto Jessie B. Hatch, beneficiary wife of Edward Hatch the insured, of New York, * * * Ten thousand dollars, in sixty days after due proof of the fact and cause of the death of said insured during the continuance of this policy; * * * provided, however, that if no beneficiary shall survive the said insured, then such payment shall be made to the executors, administrators or assigns of the said insured.'

It did not appear that Hatch either knew of, or consented to, the transfer of the policy of insurance to the plaintiff.

Held, that the complaint was properly dismissed;

That while Mrs. Hatch might properly agree when any money became payable to her under the policy to receive and hold it for the plaintiff, she could not absolutely assign the policy, as her interest therein depended upon her surviving her husband.

***Semble*, that the agreement made by Mrs. Hatch with the plaintiff was supported by a sufficient consideration.**

APPEAL by the plaintiff, Charles L. Rathborne, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 27th day of June, 1903, upon the decision of the court, rendered after a trial at the New York Special Term, dismissing the complaint upon the merits.

George E. Morgan, for the appellant.

Edward W. S. Johnston, for the respondent Hatch.

INGRAHAM, J.:

There is no substantial dispute about the facts in this case. It seems that the defendant Edward Hatch employed a firm of stockbrokers, of which the plaintiff was a member, to sell certain railroad stocks, stating to the plaintiff that he had the stock and would give it to the plaintiff for delivery if it increased in price. In pursuance of this order, the plaintiff sold the stock and delivered it in pursuance of the sale, having procured the stock from others for that purpose. The stock subsequently advanced in price, and the plaintiff called upon the defendant Edward Hatch to deliver the stock in accordance with his promise, which he failed to do. The plaintiff thereupon called upon the defendant Edward Hatch, and saw the defendant Jessie Boyd Hatch, the wife of Edward Hatch. She stated that she had read some letters from the plaintiff to the defendant Edward Hatch asking him for the stock and that she knew about the affair. She thanked the plaintiff for his kindness in waiting, and asked the plaintiff "not to do anything until her husband got well, that he was ill in bed. She said she would send this insurance policy as collateral, as it were, to the account. She said she would assign it, and she said that whether Mr. Hatch lived or died, the account would be paid." Subsequently plaintiff received a letter written by a Mr. Cody inclosing the policy of insurance and the following instrument:

"I hereby agree to collect and pay over to Mr. C. L. Rathborne, Policy No. 358374 in the North Western Mutual Life Insurance Co. drawn in my favor.

"JESSIE BOYD HATCH.

"Witness:

"EDWARD F. CODY,

"NEW YORK, *January* 20, 1899."

The plaintiff accepted the policy with this instrument and retained it. Subsequently, the defendant Edward Hatch, having failed to deliver the stock in pursuance of his agreement, the plaintiff's firm was compelled to buy in the stock for the account of Edward Hatch, leaving a balance due which has not been paid. The plaintiff then commenced this action, alleging these facts and that on the 17th of June, 1902, he presented or caused to be presented to the defendant, the Northwestern Mutual Life Insurance Company, the original policy of insurance and this instrument and demanded payment of the cash surrender value of the policy; that the said insurance company neglected and refused and still does neglect and refuse to pay the plaintiff the said cash or surrender value of the said policy, or any part thereof; that the plaintiff is unable to collect the cash value of the said policy of insurance by reason of an alleged informality of the said assignment thereof, and that the defendant Hatch is indebted and was indebted at the time of said assignment and still is indebted to the plaintiff in a sum greatly exceeding the value of said policy. And the complaint asks for a judgment requiring the defendants Jessie Boyd Hatch and Edward Hatch to assign to the plaintiff all their right, title and interest in and to said policy of insurance; and that the said defendants be decreed and required to execute, acknowledge and deliver to the plaintiff such further and different instruments of assignments and conveyance as in the premises may be necessary, proper and just, to enable the plaintiff to surrender the said policy of life insurance and collect and recover the cash surrender value thereof.

Upon the trial of the action the court at Special Term dismissed the complaint upon the ground, as is stated in the decision, that "there was no indebtedness of the defendant Jessie Boyd Hatch to the plaintiff or to the said firm of which the said plaintiff was a member. No consideration passed from the plaintiff to the defendant

Jessie Boyd Hatch for the making of the said paper in which the said Jessie Boyd Hatch agreed to collect and pay over said policy of insurance. At no time did the plaintiff make a valid agreement not to sue the defendant Edward Hatch as a consideration for the said instrument so signed by the said defendant Jessie Boyd Hatch, and the plaintiff has failed to show compliance with the provisions of section 22 of the Domestic Relations Law, and the plaintiff has failed to show either mistake or fraud on the part of the defendants or any of them, or any mistake on his part."

The policy of insurance was dated on the 27th day of November, 1896, and provided that upon the payment of the premiums the insurance company would pay "unto Jessie B. Hatch, beneficiary wife of Edward Hatch the insured, of New York, * * * Ten thousand dollars, in sixty days after due proof of the fact and cause of the death of said insured during the continuance of this policy; * * * provided, however, that if no beneficiary shall survive the said insured, then such payment shall be made to the executors, administrators or assigns of the said insured." The agreement which the plaintiff seeks to enforce was a promise of the beneficiary, who was the wife of the insured, that "she would send this insurance policy as collateral, as it were, to the account;" that "she would assign it." In pursuance to that agreement, she transmitted to the plaintiff an instrument by which she undertook to collect the amount due under this policy and transmit it to the plaintiff, and that was received by the plaintiff as a compliance with the contract that he had with the beneficiary of the policy. By the terms of this policy, the interest that Mrs. Hatch had was conditioned upon her surviving the insured. She had no absolute right to dispose of the policy and to receive its surrender value from the insurance company. In the event of her death before the insured the amount of the policy when due was to be paid to the personal representatives of the insured. All that Mrs. Hatch could do was to assign her right to receive the amount payable upon the death of her husband in the event that she survived him. The plaintiff had no interview with Mr. Hatch in relation to this policy of insurance, and, so far as appears, he had no knowledge of the agreement that was made and never consented, either in writing or otherwise, to a transfer of the policy by Mrs. Hatch to the plaintiff. Cody, who

sent the policy to the plaintiff, testified that he thought it was sent at Mr. Hatch's request; but Mr. Hatch testified that he had no knowledge of the transmission of the policy and that he gave Cody no directions to send the policy to the plaintiff.

While we do not agree with the learned trial judge that there was no consideration for this agreement made by Mrs. Hatch with the plaintiff, we agree with him that in this case the plaintiff is not entitled to the relief asked for. What the plaintiff was entitled to under the contract with Mrs. Hatch, was a delivery of the policy and a transfer of Mrs. Hatch's interest in this policy. She could agree with the plaintiff that she would, when the policy came due, or when any money was payable under it, receive the amount so payable and hold it for the plaintiff. She could not absolutely assign the policy, because her interest in it depended upon her surviving the insured. Under the policy she, without the assent of the insured, had no right to surrender it to the company and to receive the surrender value, and she did not, in express terms, assign to the plaintiff that right. When she agreed to assign the policy to the plaintiff, it was an agreement to assign her interest in it, which was to receive the amount payable to her upon the death of the insured during her life. Upon the evidence, the court was justified in finding that the insured never assented to the transfer of the policy of insurance to the plaintiff, and it is not claimed that there was such a written consent by the insured as was required by section 22 of the Domestic Relations Law (Laws of 1896, chap. 272).

We think that the plaintiff never acquired a right to an absolute assignment of the policy which would include the right of the insured, or a right to surrender the policy and to receive the surrender value; and the judgment is, therefore, affirmed, with costs.

VAN BRUNT, P. J., PATTERSON, HATCH and LAUGHLIN, JJ., concurred.

Judgment affirmed, with costs.

MAX KING, Respondent, v. THE CONSOLIDATED GAS COMPANY OF NEW YORK, Appellant.

Negligence — liability of a gas company to a tenant injured by an explosion of gas.

A plumber residing in a tenement house was requested by the janitor of the building to go into the cellar and attend to a leak in the gas pipes. Upon attempting to enter the cellar with a lighted candle, an explosion of gas occurred and he was injured. He thereupon brought an action against the gas company which supplied the house with gas and recovered a judgment against it.

On the trial of this action it appeared that a short time prior to the explosion an employee of the gas company inspected the cellar for the purpose of ascertaining the location of the leak, and that he reported that the pipes, with the care of which the gas company was chargeable, were in order, and suggested that the defect was in the pipes cared for by the landlord.

The only explanation of the cause of the explosion was that a nut or cap which covered an opening in a T fixture, not put in by the gas company, which cap was apparently in place when the employee of the gas company made his examination, had come off and been replaced by a cork.

Held, after a consideration of the evidence adduced on the trial, that the plaintiff had not proved any negligence on the part of the gas company or its employees and that the judgment should be reversed.

APPEAL by the defendant, The Consolidated Gas Company of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 5th day of June, 1903, upon the verdict of a jury for $650, and also from an order entered in said clerk's office on the 8th day of June, 1903, denying the defendant's motion for a new trial made upon the minutes.

David McClure, for the appellant.

Max D. Steuer, for the respondent.

INGRAHAM, J.:

By this action the plaintiff sought to hold the defendant responsible for an injury sustained by him in consequence of the explosion of gas in the cellar of a tenement house in which the plaintiff resided. The defendant is engaged in supplying illuminating gas in the city of New York, and supplied such gas for the premises in question, and for that purpose maintains gas mains in the street and

a service pipe connecting such mains with the gas pipes in the building. The complaint alleges that this service pipe connecting the defendant's mains with the gas pipes in the house was connected with a small pipe or drip pipe placed in said building and owned by the defendant; that on and prior to the 18th of February, 1899, the thread connecting the supply pipe with the drip pipe contained a leak and was unfit for the use for which it was intended, and was in such a bad state and condition and in such ill-repair that gas was permitted to and did escape; that on the 18th of February, 1899, the defendant was informed that gas was escaping from its pipes in the cellar of the premises No. 1442 Avenue A, and the defendant was required to examine the said pipes and repair the same, and that thereafter and on the said 18th day of February, 1899, the defendant sent two of its agents to examine the premises, who entered the cellar and thereafter reported that the pipes in said cellar were all right and were not in a condition of ill-repair and contained no leaks, and that there was no escape of gas in said cellar; that within a few minutes after such statement "this plaintiff, for the purpose of examining the cause of the stench and relying upon the statements of the defendant's inspectors, servants, agents and employees, and believing that there was no gas escaping in said cellar and that there were no leaks in the pipes, lit a candle and was about to enter the said cellar, and had stepped on the first step of the staircase leading to the said cellar, when immediately there was an explosion of gas in said cellar," and the plaintiff was injured.

The plaintiff testified that he resided at the premises in question and was a plumber by trade; that at about twelve o'clock on the 18th day of February, 1899, he noticed a smell of gas in the house and saw the men there who were employees of the defendant; that he saw them go into the cellar, and after a few minutes they came out; that the plaintiff asked them if they had found any leak in the cellar, to which they replied, "No, we can't find no leak in the cellar; the cellar is everything all right;" that after that the defendant's inspectors left; that about ten minutes after this interview the plaintiff, at the request of the janitor of the house, started to go into the cellar to turn off the gas for the house; that at that time there was a smell of gas through the house; that the plaintiff took a lighted candle, opened the cellar door, stepped down two

steps upon the cellar stairs, when the explosion occurred, seriously injuring the plaintiff. Upon cross-examination he stated that he had been in the habit of doing plumbing work in the building at the request of the landlord; that just after the employees of the defendant left the premises the janitress of the building came out and asked the plaintiff to go down; that at that time he did not notice much of a smell of gas; that it was not so strong as when he went down in the morning; that he got a candle from the janitress and lighted it to open the cellar door.

A tenant in this building, called by the plaintiff, testified that he noticed the smell of gas early in the morning and telephoned to the defendant; that in about half an hour after the defendant's inspectors came to the building, went down in the cellar and made an examination and reported to the janitress that they had looked after everything carefully and found that there was no mistake in the company's pipes; that there must be a mistake on the landlord's side; that the housekeeper must get a plumber and that the mistake must be somewhere in the ceiling; that they did not know, but it was not on their side; that the plumber for the house was the plaintiff.

There was no evidence on behalf of the plaintiff as to where the leak that occasioned this explosion was, and at the end of the case the defendant moved to dismiss the complaint. This motion was denied and the defendant excepted. The inspector who made the examination for the defendant testified that when he arrived at the house he was informed by the janitress that there was a smell of gas in the halls; that there were three different cellars to the building, and that he went into them all; that he went around with a candle and examined the service pipes in the three cellars; that he was there about fifteen or twenty minutes; that he found no smell of gas of any kind in the cellars; that with the connection with the pipes that run up through the house there was a fixture called a "T;" that the end of this fixture fits into the pipe that comes from the main; that there is a nut or cap upon the bottom of this fixture and the open part of the fixture communicated with the pipes that carry gas up through the house; that the witness noticed such a fixture in the rear cellar; that when he examined this fixture he found the plug or cap screwed onto it; that it was in place and

fastened, and that there was no gas escaping through it; that after the explosion the witness was again sent to make an examination of the premises, accompanied by an inspector of the defendant; that he found the cap or nut, which, when he examined the pipe before had been screwed on tight, was off and a cork was inserted in the pipe in its place; that this cork must have been put in after the explosion; it was not there when he first visited the premises, and it was there when he went back after the explosion; that this cork was keeping the gas from coming out of the pipe; that he examined all the pipes in the cellar, and the only change that he noticed was that this cork was inserted in the pipe in the place of the plug or cap which was there when he made his first examination; that this "T" fixture was not connected with the pipes put in by the defendant; that it is fully twenty-five feet back; that it was put there by the owner of the building; that the witness was not instructed to examine the building, except so far as to see whether there was a leak in the company's pipes; that the company's pipes stopped when they came in through the main foundation wall; that the company had inside the house merely the meter connection, a short piece of pipe in the front cellar. This testimony was corroborated by the other employee of the defendant who had examined this fixture.

It is quite evident that there was nothing proved by which the defendant or its employees could be charged with negligence. There is nothing to show that any portion of the pipes maintained by the defendant was out of order, or that the escape of gas was caused by a leak in the pipes which the defendant was bound to maintain. The only evidence as to the condition of the defendant's pipes is the testimony of the defendant's employees, who, on the second visit, discovered that a nut or cap that covered this fixture had come off and had been replaced by a cork. That such a condition did not exist when the defendant's employees visited the premises before the explosion is apparent from the fact that they went through the cellar with a lighted candle and there was no explosion. What caused this nut or cap to come off between the time that the defendant's inspectors left and the explosion is purely a matter of conjecture, but whatever caused this condition it was certainly no fault of the defendant or its employees, and the company was not responsible for the condition of this fixture, as it was

connected with the gas pipes of the house and was not a portion of the pipes installed or maintained by the defendant. All that the defendant's agents were bound to do was to ascertain if the pipes maintained by the defendant were in proper order. That examination they made and reported to the janitress that their pipes were in order and that the leak in the house mains came from the pipes maintained by the owner of the premises, and that to stop that leak they must get a plumber. There was here an express notice that the leak was not in the defendant's pipes, but in the pipes belonging to the house, and the subsequent investigation shows that that statement was correct. The landlord, or his representative, accepted the suggestion made by the defendant's employees, employed the plaintiff as a plumber to repair the leak, he accepted that employment and, while acting for the owner of the house, caused the explosion by which he was injured. Certainly there can be here no ground to hold that the defendant was negligent.

It follows that the judgment and order appealed from must be reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., O'BRIEN, MCLAUGHLIN and HATCH, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

THOMAS J. HEALY, Respondent, v. THE CITY OF NEW YORK and J. HAMPDEN DOUGHERTY, Commissioner of Water Supply, Gas and Electricity of the City of New York, Appellants.

Water rates — when the city is bound by meter measurement although the meter has been made to run slowly.

Upon an examination of a water meter installed in premises in the city of New York it was found that eight of the ten teeth that worked the dial thereof had been filed off, so that the meter could possibly register but one-fifth of the amount of water used when the amount was over 1,000 feet. The water department, upon discovering this fact, presented to the occupant of the premises a bill charging him with five times the amount of water registered upon the meter. The occupant having refused to pay this amount, the department attempted to shut off the water.

The occupant of the premises did not take possession of the premises until some time after the meter had been installed, and, so far as appeared, he had not tampered with the meter and was not guilty of any fraud.

Held, that sections 473 and 475 of the revised Greater New York charter (Laws of 1901, chap. 466), which provide, "In all such cases the charge for water shall be determined only by the quantity of water actually used, as shown by said meters," and also, "The said department shall make out all bills and charges for water furnished by them to each and every consumer as aforesaid, to whose consumption a meter as aforesaid is affixed, in ratable proportion to the water consumed, as ascertained by the meter on his or her premises or places occupied or used as aforesaid," contemplated that in making a charge for water the city should be bound by the amount registered by the meter;

That the occupant of the premises in question having paid the amount indicated by the meter, the city could not, in the absence of any proof that he was responsible for the defective condition of the meter, cut off his supply of water because of his refusal to pay the bill presented to him.

VAN BRUNT, P. J., and HATCH, J., dissented.

APPEAL by the defendants, The City of New York and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 29th day of June, 1903, upon the decision of the court rendered after a trial at the New York Special Term.

Chase Mellen, for the appellants.

M. Edward Kelley, for the respondent.

INGRAHAM, J.:

The defendant Dougherty, as commissioner of water supply, gas and electricity of the city of New York, threatened to cut off the supply of water furnished to certain premises leased by the plaintiff, whereupon the plaintiff commenced this action to enjoin the defendants from interfering with his supply of water. The defendants, in answer, alleged that under the rules of the department a water meter had been installed to measure the amount of water furnished to the premises occupied by the plaintiff; that this meter had been tampered with so that it measured but one-fifth of the supply of water actually furnished; that a bill for the amount of water actually furnished in excess of that registered by the meter for which the plaintiff was liable had been furnished by the defendants, and demand made for payment, and payment was refused, and that for this refusal the defendants are entitled to cut off the supply of

water; and, as a counterclaim, the defendants demanded judgment against the plaintiff for the water actually used on the premises which had not been paid for. The court below granted a judgment as prayed for by the plaintiff and dismissed the counterclaim, and from that judgment the defendants appeal.

It was proved that application had been made to the department for permission to install a water meter upon the premises in question on August 19, 1898, by a plumber acting for the owner or occupant of the premises, and that on August 22, 1898, in pursuance of this application, the department granted such permission. The regulations of the department required that this permit should be presented at the "pipe and meter yard" to obtain a water meter that had been tested by the department. This permit was so presented to the pipe and meter yard, and the plumber received a meter, No. 118,706. This particular meter had been shipped to the pipe and meter yard from the manufacturers, the Thompson Meter Company, on the 23d day of August, 1898, and was subjected to the usual test by the officers of the department. After it was thus tested, a seal was placed upon it by the department, so that the mechanism could not be tampered with without breaking the seal. The meter, thus tested and sealed, was delivered to the plumber, who caused it to be installed in the premises subsequently occupied by the plaintiff. It was inspected from time to time by the regular inspectors of the department, who, in each instance, examined the seal and found it intact. The amount of water registered at each inspection was taken by the inspector and returned to the department, and bills were sent to the plaintiff or the owner of the building therefor, which were paid. During this period the water meter was inclosed in a box and kept locked, the key of which was in the possession of the plaintiff, kept by him in a safe and delivered to the inspectors of the department when required. The employees of the plaintiff testified that during this period the water meter was not interfered with in any way by the plaintiff or any of his employees, or by any one except the inspectors of the department. In January, 1902, two inspectors of the department visited this meter and broke the seal, which, while somewhat worn, was still intact, and examined the mechanism, when it was found that eight of the ten teeth that worked the dial that registered each 1,000 cubic feet of water

used had been filed off so that the meter could possibly register but one-fifth of the amount of water used when the amount was over 1,000 feet. One of the remaining teeth was partly filed, and one tooth of the wheel was intact. When this condition was discovered the water department gave notice to the plaintiff by presenting to him a bill charging him with five times the amount of water registered upon this meter, crediting him with the payments already made, and demanding payment of the balance, with a threat that unless it was paid the water would be turned off. The plaintiff refused to pay this amount, and the department commenced to make the necessary excavation to shut off the water, whereupon the plaintiff commenced this action and obtained a temporary injunction, which was made permanent upon the trial. The plaintiff testified that he had never in any way interfered with this meter; that he took possession of the premises about the first of October, some time after the meter was installed, and his employees in charge of his establishment testified that the water meter had never been tampered with while the plaintiff was in possession of the premises. After a new meter was installed and the amount of water used upon the premises ascertained, a new demand was made by the city for water furnished, based upon the amount of water indicated by the new meter as having been used by the plaintiff after the defective meter had been removed, and this charge, which was largely in excess of the first bill rendered, the plaintiff also refused to pay.

The defendants upon this appeal do not claim that it was error to dismiss the counterclaim, and that will not be considered, the only question being whether or not the plaintiff was entitled to the affirmative relief enjoining the defendants from cutting off the water supply to the premises. That this meter was defective, and that such defect had been caused by filing the teeth of the wheel which regulated the dial showing the water furnished above 1,000 cubic feet is not disputed, nor did the plaintiff dispute the evidence of the defendants which tended to show that this meter could register but one-fifth of the amount of water supplied; that is, that the indicator on the meter dial showing the amount of water supplied above 1,000 feet would make a complete revolution when 5,000 cubic feet of water were used, instead of when 1,000 feet were used, as would have been the case if the meter had been in proper order.

This meter having been placed in the plaintiff's premises, and being under his exclusive control from the time he took possession until it was examined and found defective, the necessary presumption is that it was either defective at the time it was furnished or had been tampered with in some way by those to whom it had been delivered. The evidence offered by the plaintiff tended to show that after he had taken possession of the premises and commenced to use the water the meter had not been interfered with in any way, and it would consequently appear that in some way this meter was defective at the time that it was installed.

By section 473 of the charter (Laws of 1901, chap. 466) it is provided that "The board of aldermen shall hereafter have all power, on recommendation of the commissioner of water supply, gas and electricity, to fix and to establish a uniform scale of rents and charges for supplying water by The City of New York, * * * but no charge whatever shall be made against any building in which a water meter may have been or shall be placed, as provided in this act. In all such cases the charge for water shall be determined only by the quantity of water actually used, as shown by said meters." Section 475 of the charter provides that "The commissioner of water supply is authorized, in his discretion, to cause water-meters, the pattern and price of which shall be approved by the board of aldermen, to be placed in all stores, workshops, hotels, manufactories, office buildings, public edifices, at wharves, ferry-houses, stables, and in all places in which water is furnished for business consumption, * * * so that all water so furnished therein or thereat may be measured and known by the said department, and for the purpose of ascertaining the ratable portion which consumers of water should pay for the water therein or thereat received and used. Thereafter, as shall be determined by the commissioner of water supply, the said department shall make out all bills and charges for water furnished by them to each and every consumer as aforesaid, to whose consumption a meter as aforesaid is affixed in ratable proportion to the water consumed, as ascertained by the meter on his or her premises or places occupied or used as aforesaid."

These provisions of the statute would seem to indicate an intention to regulate the charge for water furnished by the city of New

York to buildings in which a water meter had been installed by the amount of water supplied to the building as indicated by the meter; and thus, if a meter so installed should show that an amount of water had been used, it would not be competent for the occupant of the building to dispute payment of that amount upon the ground that for any reason the amount indicated upon the meter was not correct, and that the city was also bound in making its charge for water used by the amount of water indicated upon the meter. Thus, section 475 of the charter provides that "thereafter * * * the said department shall make out all bills and charges for water furnished by them to each and every consumer as aforesaid, to whose consumption a meter as aforesaid is affixed in ratable proportion to the water consumed, as ascertained by the meter on his or her premises or places occupied or used as aforesaid." There is here an attempt to charge for water used upon the premises, which is not "as ascertained by the meter" on the premises or places occupied or used by plaintiff.

We are referred to no case in which these particular provisions of the charter have been construed. In *Krumenaker* v. *Dougherty* (74 App. Div. 452) we held that a person who had defrauded the city of its revenue by diverting the water used by him so that it would not pass through the meter and thus be registered, could not maintain an action to restrain the city from cutting off his water supply without paying an amount fixed as the amount of water that he had used which had not passed through the meter. In such case it is the fraud practiced by the person using the water which justifies the city in cutting off his further supply, and the court could not interfere in behalf of one guilty of such a fraud, but in this case there is no evidence that the plaintiff was guilty of fraud. The meter was upon his premises before he occupied them. He accepted the situation that he found there when he took possession of the premises, paid the charges made by the city for water that he used upon the premises, and there is no evidence to show that after he took possession of the premises this meter was in any way interfered with, or that any fraud was committed by the plaintiff or by the owner of the building. Under these circumstances it would appear that by the provisions of the charter the city could make no charge for water except such as was indicated by the meter, and the

charges as indicated by the meter having been paid, the city was not entitled to deprive this plaintiff of a supply of water until he paid an additional sum for water which had been used upon the premises, but had not registered upon the meter.

For this reason I think the judgment appealed from was right and that it should be affirmed, with costs.

PATTERSON and LAUGHLIN, JJ., concurred; VAN BRUNT, P. J., and HATCH, J., dissented upon the ground that the meter shows that plaintiff used five times the amount of water that he paid for.

Judgment affirmed, with costs.

GERTRUDE S. KRAMER, Appellant, v. EDWIN G. KRAMER, Respondent.

Oral contract to marry is valid — an oral contract in consideration thereof is not — specific performance — marriage a good consideration — when property given by a husband to his wife will be considered to be in consideration of marriage and not of a promise to marry — consideration which will sustain a promissory note of a third person given by a husband to his wife — recital therein for "value received" — credibility of the testimony of an interested witness — Statute of Frauds not applicable to an executed contract — it must be pleaded.

An oral promise to marry is binding, while an oral contract in consideration of marriage is void under the Statute of Frauds.

Specific performance of a promise to marry will not be decreed, while specific performance of a valid contract in consideration of marriage will.

Marriage is among the highest considerations known to the law, and the courts favor the enforcement of contracts based on that consideration.

Where a husband, after the mutual promises to marry have been given, but before the marriage, orally agrees to give his wife certain property, the consideration for such oral agreement is the marriage and not the promise to marry; and where, subsequent to the marriage, the husband, in performance of the promise and with relation to its consummation by marriage, gives to his wife a promissory note executed by his brother and made payable to the wife's order, which note the husband's brother had delivered to the husband to enable him to perform such oral agreement, the wife may compel the husband's brother to pay the note, even though no consideration for the note passed from the husband to his brother.

The oral agreement having been executed, the Statute of Frauds does not apply thereto; in any event, it is not available to the husband's brother in an action to enforce payment of the note unless it is pleaded in the answer.

A recital in the note, which ran directly to the wife, that it was given for "value received," imports a consideration moving from the wife to the husband's brother.

The credibility of the testimony given by the husband's brother on the trial of the action to enforce the note is for the jury to determine, and they may accept a portion of his testimony and reject other portions thereof.

APPEAL by the plaintiff, Gertrude S. Kramer, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 15th day of May, 1903, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 18th day of May, 1903, denying the plaintiff's motion for a new trial made upon the minutes.

William W. MacFarland, for the appellant.

Daniel P. Hays, for the respondent.

HATCH, J.:

This action is brought to recover the amount secured to be paid by a promissory note. The note reads:

"$12,000. "BOSTON, MASS., *April 1st*, 1901.

"——— after date I or my estate promise to pay to the order of Gertrude Short Kramer Twelve thousand Dollars at 6% interest from date, at 474 Commonwealth Ave., Boston, Mass. Value received $12,000

"No. 1 Due ...... EDWIN G. KRAMER."

The defenses interposed by answer were that there was no consideration for the note and that the same had not been delivered to the plaintiff, or, if delivered, that such delivery was in fraud of the rights of the defendant and in violation of the express condition and promise upon which the said note was delivered, and that, therefore, the plaintiff was not a *bona fide* holder of the same and was possessed of no legal right to enforce payment thereof. Upon the trial the plaintiff introduced the note in evidence and rested. Thereupon the defendant read in evidence the deposition of the plaintiff, taken pursuant to an order of the Appellate Division (70

App. Div. 615). It was disclosed by this examination that the note in question was delivered by Alfred E. Kramer to the plaintiff on the 6th day of May, 1901, in a sealed envelope, upon the outside of which was written: "This is the personal property of Gertrude Short Kramer to be delivered to her or to myself only in case of necessity. A. E. Kramer." The envelope was sealed with a white seal and the letters "A. E. K." placed thereon. These letters and indorsements were both in the handwriting of Alfred E. Kramer. When he delivered the envelope and note to the plaintiff he directed her to give it to her aunt to put in a safe deposit box. The plaintiff did as she was directed to do and did not see the envelope until August, 1901, when she procured the same from the safe deposit vault, made claim against the defendant for the amount to be paid thereby, and he refusing to pay, she brought this action. It was admitted by the plaintiff that no consideration passed from her to her husband at the time of the delivery of the note to her, and that no consideration passed from her to the defendant at any time which was represented by the note in question. The defendant also introduced his deposition, taken before a commissioner, wherein he testified that he never received any consideration for the note from his brother Alfred E. Kramer; that he was not indebted to him in any amount, and that he signed and delivered the note to his brother some time after his marriage upon the representation that he was in domestic trouble by reason of complaints and fault-findings by his family; that he was without means or property, and had been subjected to such complaints for nearly a year; that he desired the note in order to exhibit it to the plaintiff for the purpose of showing that he was possessed of property, and that upon such representations and with the understanding that the note was not to be delivered or pass from the possession of Alfred E. Kramer, but only to be exhibited, the defendant delivered it to him. After this testimony had been given the plaintiff was called as a witness in rebuttal and testified that she became engaged to be married to Alfred E. Kramer in May, 1898, and that the engagement was consumated by marriage November ninth of the same year; that between the date of the engagement and the marriage she had a great many conversations with Alfred E. Kramer about giving her some property prior to the marriage; that the matter was talked over in the presence

of the mother and aunt of the plaintiff. As a result of these conversations, Kramer agreed to give to the plaintiff $10,000, which was to be increased from time to time as he was thereafter able. No payment was made before marriage. After the marriage there were several conversations respecting the subject, as a result of which the note in question was delivered and no further demand therefor was made by the plaintiff upon her husband for the fulfillment of the ante-nuptial agreement. Upon the former trial of this case, and in all substantial respects upon the same testimony, the trial court directed a verdict in favor of the plaintiff for the amount of the note, with interest. Upon appeal to this court the judgment entered thereon was reversed and a new trial granted for errors committed in the reception of evidence. (*Kramer* v. *Kramer*, 80 App. Div. 20.) Upon the present trial at the close of the case the learned trial judge directed a verdict in favor of the defendant. This ruling proceeded upon the ground that there was no consideration for the note as between the plaintiff and the defendent, or between the defendant and Alfred E. Kramer, and that there was no consideration for the note moving from the plaintiff to her husband. The latter holding seems to be based upon the ground that at the time when the agreement was made to give the plaintiff $10,000, and such additional sum as he was able, it was in consideration of the promise to marry, and that such promise had already been given, and there was then a subsisting engagement by mutual promise that as there was no consideration for it, and such promise being thereafter fulfilled by marriage, without further contract or condition, there was no consideration for anything. The court seems to have recognized that a contract for the payment of a sum of money or settlement upon the wife in consideration of marriage might be a binding contract, but that this was not such a contract, and as there was no agreement in writing to pay the money in consideration of marriage, it was void by the Statute of Frauds. We are, therefore, to see if this ruling can be sustained. There is an essential difference between a promise to marry and a contract made in consideration of marriage. A promise to marry is binding, although verbal. A contract in consideration of marriage is void, unless in writing, under the 3d subdivision of the Statute of Frauds (Laws of 1897, chap. 417, § 21, subd. 3). Specific performance

may not be had of the promise to marry, and parties for a breach of such contract are relegated to an action for damages as the exclusive remedy. Valid contracts in consideration of marriage may be specifically enforced. (Schouler Dom. Rel. [5th ed.] § 172 *et seq.*) Marriage is among the highest considerations known to the law and is sufficient in support of a voluntary settlement based upon it. (*Sterry* v. *Arden*, 1 Johns. Ch. 260; *Henry* v. *Henry*, 27 Ohio St. 121.) In *Ayerst* v. *Jenkins* (L. R. 16 Eq. Cas. 275 [1873]) a settlement in consideration of marriage was upheld as against the personal representatives of the settlor, although the marriage under the laws of England was invalid. The law has always jealously guarded the rights secured to the wife by ante-nuptial agreements in consideration of marriage and has safeguarded the interests of the wife whenever it was possible in application of legal rules. It was said of such an agreement by Chancellor KENT: "They usually proceed from the prudence and foresight of friends, or the warm and anxious affection of parents; and, if fairly made, they ought to be supported according to the true intent and meaning of the instrument by which they are created. A court of equity will carry the intention of these settlements into effect, and not permit the intention to be defeated. These general principles pervade the numerous and complicated cases on the subject." (2 Kent Com. [14th ed.] *165.) Such contracts have been supported, based upon very informal instruments, the court disregarding so far as possible external defects, if only the intention may be arrived at, and such intention and agreement has been gathered from letters and informal writings upon the subject, the contract drawn therefrom and specific performance of the same awarded. (Schouler Dom. Rel. [5th ed.] § 176 *et seq.* and cases cited.) If the evidence justifies a finding of the existence of an agreement in consideration of marriage courts will support it. In the present case the evidence upon the part of the plaintiff is sufficient to justify the finding of an agreement made in consideration of marriage. The conversation relating thereto was after the engagement of the parties to marry. It related to a consummation by marriage and was, therefore, quite distinct and independent of the promise to marry. It was before the marriage that the agreement was made to pay the money and such payment was based upon the proposed consummation of the parties' engagement

to marry. The engagement itself was not mentioned as forming any part of the consideration, but the evidence was that upon marriage the plaintiff would give the specified sum. To hold that under such circumstances the consideration for the agreement to pay was the promise to marry would work a destruction of every ante-nuptial contract. In all of them the engagement to marry existed and the language of the settlements on marriage recited in usual form "Whereas a marriage is intended to be solemnised between," etc., "Witnesseth that in further performance of the said agreement and in consideration of the said intended marriage it is hereby agreed and declared," etc. (Vaiz. Sett. 108.) * In the present case the evidence shows a promise to marry and then follows the agreement to pay followed by the marriage, and if the jury found that this evidence was true they could not only find, but the irresistible conclusion would be that the agreement to pay was based upon the consideration of marriage, and consequently if it was properly evidenced all the elements of a good promise in consideration of marriage would exist. It would scarcely be claimed that if the husband had executed and delivered to the wife his promissory note for the amount which he had agreed to give her as her property prior to the marriage after the conditions had been discussed, and then marriage took place, that the promissory note could not be enforced in the hands of the wife. Every element of a good contract in consideration of marriage would be present in such a case. So here every element of a good agreement was present if the evidence had been embodied in a writing and signed by the husband before marriage. The cases are abundant in support of such conclusion (*Banfield* v. *Rumsey*, 4 T. & C. 322; *Wright* v. *Wright*, 54 N. Y. 437; *Johnston* v. *Spicer*, 107 id. 185.) Nothing contained in *Blanshan* v. *Russell* (32 App. Div. 103; affd., 161 N. Y. 629), or in *Cloyes* v. *Cloyes* (36 Hun, 145), is in conflict with this view.

In the first of these cases it appeared that the engagement of marriage was existing at the time the promise was made to give the note. A marriage was never consummated between the parties, nor was there evidence from which it could be inferred that the note was to be given in consideration of marriage. Under these

* See Vaiz. Preced. & Forms, 108.—[Rep.

circumstances the court properly held that there was no consideration for the note and that the mere existence of the engagement would not support an executory contract to pay money.

In the second case there was an attempt to enforce payment of a check, which had been given to the wife on the night of the marriage. There was no prior agreement to give it, the wife knew nothing about it and did not see it until after the ceremony of marriage had been performed and she testified that it was a surprise to her. The wife delivered the check to the defendant for safekeeping. Differences having subsequently arisen between the parties, she brought action to recover the amount of the check. The court held that a subsisting contract to marry was not a good consideration for the check, and that such agreement could not be enforced, unless a contract was made, having for its basis the consideration of marriage, and this was not shown to exist; that the check could not be enforced as a gift, as it transferred nothing. We recognize the rule of these cases. The distinction, however, is plain, for here the evidence is sufficient to warrant the jury in finding that the note was given in consideration of marriage, based upon an agreement entered into after the engagement. We conclude, therefore, that the oral agreement, if established, followed by marriage was sufficient, upon which to found a promise to pay money by the husband to the wife; that it was made in consideration of marriage and not of the promise to marry, and that the jury would be authorized so to find.

It is evident, however, that such contract was void by the Statute of Frauds, as it was not in writing. It was not illegal or immoral; on the contrary, it was a contract of the highest character, the enforcement of which is favored by the courts. There was, therefore, nothing which prevented the husband from subsequently recognizing the contract and performing it either in accordance with its terms, or in such form and manner as the parties might agree. The testimony tends to show that after the marriage and in fulfillment of the contract, the husband gave to the wife the promissory note in question. When this was done, it became an executed contract and the Statute of Frauds has not the slightest application to such a case (*Remington* v. *Palmer*, 62 N. Y. 31; *Murdock* v. *Gilchrist*, 52 id. 242), and having been per-

formed, it was beyond the power of the husband to recall his act. In *Newman* v. *Nellis* (97 N. Y. 285) the court in speaking upon this subject said: "But we know of no rule of law which prevents a party from performing a promise which could not be legally enforced, or which will permit a party, morally but not legally bound to do a certain act or thing, upon the act or thing being done, to recall it to the prejudice of the promisee on the plea that the promise, while still executory, could not by reason of some technical rule of law have been enforced by action." The cases deciding this principle are numerous. (*Van Valkenburg* v. *Croffut*, 15 Hun, 147; Browne Stat. Frauds, § 116 *et seq.* and cases cited; Wood Stat. Frauds, § 235 and cases cited; *Pool* v. *Horner*, 20 Atl. Rep. 1036.) In *Lloyd* v. *Fulton* (91 U. S. 479) it was held that a verbal promise by the husband in consideration of marriage to make a settlement upon the wife was void under the Statute of Frauds and that a verbal promise made thereafter was also void, yet as the settlement was voluntarily made after marriage, it was good as against the husband and also good as against creditors in the absence of fraud. In *Hammersley* v. *Baron de Biel* (12 Cl. & Fin. 45 [1845]) it was held by the chancellor that although a parol agreement or settlement in consideration of marriage was void under the Statute of Frauds, yet that a subsequent written acknowledgment of the promise was sufficient to take it out of the statute. It is evident, therefore, that the delivery of the promissory note constituted a valid, executed agreement, based upon the consideration of marriage, and the note became as absolutely the property of the wife, as between herself and her husband, as though he had delivered to her the equivalent in money in fulfillment of the engagement he was under. It is evident, however, that the question of the Statute of Frauds is not involved in any view of the case. In order to be available it would be necessary for the defendant to plead it (*Matthews* v. *Matthews*, 154 N. Y. 288), and this he has not done.

This brings us to a consideration as to whether the execution and delivery of a promissory note by a third person in discharge of the obligation of the husband furnished a good consideration therefor, so as to make the promisor therein liable for the amount agreed to be paid. It has been held many times that a promise to pay by a third person a given sum to a creditor, in consideration of the discharge of

an indebtedness held by such creditor or of a colorable claim asserted against the debtor, furnishes a good consideration for the promise of the third person and it will be enforced by action. (*Becker* v. *Fischer*, 13 App. Div. 555; *Stack* v. *Weatherwax*, 24 N. Y. St. Repr. 90; *Traders' National Bank* v. *Parker*, 130 N. Y. 415; *White* v. *Hoyt*, 73 id. 505.) If, therefore, it be conceded that the defendant delivered the note for the purpose of enabling his brother to discharge the obligation which he recognized as existing in favor of the wife, and the note was delivered pursuant to such understanding, the defendant cannot be heard to say that there was no consideration for the note. Under such circumstances the reception of the note by the plaintiff in discharge of the obligation enabled her to enforce the contract, and it is immaterial in support of such right whether any consideration passed from the brother to the defendant for the note or not. The note itself recited that it was given for value received and ran directly to the plaintiff. This recital, therefore, imported value as moving from the plaintiff to the defendant, and the burden rested upon the defendant to show that he received no consideration therefor. (*Strickland* v. *Henry*, 175 N. Y. 372; *Rector, etc.*, v. *Teed*, 120 id. 583.) Assuming that this presumption was successfully met by the defendant when it appeared that the plaintiff in fact gave no value therefor to the defendant, yet, in view of the testimony, it became a question of fact as to whether or not there was not a good consideration for the note which moved from the brother to the defendant. It certainly is a departure from recognized business conduct for one person to execute and deliver to another his promissory note, reciting it to be for value received, when in fact there exists no consideration therefor, and it is not to be used for business purposes. It is disclosed by the testimony that there had been business dealings between the defendant and his brother in previous years, and that in the course of such dealings he had executed and delivered to him several notes representing an actual indebtedness, and that the business transactions between them covered a part of six or seven years, and that a settlement of such business dealings did not take place until May 1, 1900. It, of course, goes without saying that if there was a consideration moving from the brother to the defendant, it is sufficient to support the validity of the note in the hands of the plaintiff. That the note

was given for a consideration is recited upon its face; that there had been notes for a valuable consideration moving from the brother in the course of their business transactions is conceded, and the brother is found in the possession of this note, conceded to have been voluntarily delivered by the defendant to him. The defendant is the party in interest and the success of his defense rested upon his testimony. There was conflict between the testimony which he gave and the recital in the note. His evidence was much shaken. His interest, therefore, was of the highest character and his credibility became under the evidence a question for the jury, and not one of law for the court to determine. (*Strickland* v. *Henry*, *supra; Volkmar* v. *M. R. Co.*, 134 N. Y. 418; *Eastland* v. *Clarke*, 165 id. 420.)

It was further claimed by the defendant that the note was diverted from the purpose for which it was given, and that it was delivered to his brother upon the express understanding that it was to be used only for the purpose of exhibition to the plaintiff and her family and was not to pass from the possession of the brother. While he so testified, he also testified that in March, 1901, his brother wrote him that he was coming to Boston to see him on business; that subsequently he came and stated to the defendant: "I want to have you give me a note for a certain amount. * * * I must have a note. I want to give a note to my family. * * *" He also testified: "He said to me, well, he didn't know of anyone else to call upon and called upon me to give him this note and I foolishly did so. * * * I mailed it to him." If this testimony is to be believed, it establishes the fact that at the time when the application for the note was made, it was stated that it was to be given to his family. It is quite true that other statements were made by the defendant contradicting this and tending to sustain the averment of the answer that the note was diverted, but this, like the preceding point, which we have considered, became, under the evidence, a question of fact for the jury to determine. The credibility of the defendant's testimony was for them, and they were authorized to accept this statement and reject the others, and find therefrom that defendant knew the purpose for which the note was to be given, and delivered it to be used for such purpose, and if they so found, the right of the plaintiff to enforce the note, based upon such facts, is unimpeachable.

It follows from these views that the judgment and order should be reversed and a new trial granted, costs to the appellant to abide the event.

Van Brunt, P. J., O'Brien, Ingraham and McLaughlin, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

Harry L. Williamson, Respondent, v. Mortimer H. Wager, as President of the Consolidated Stock and Petroleum Exchange of New York, Appellant.

Pleading — general statements qualified by additional averments — conclusions of law distinguished from statements of fact — allegation of membership in a voluntary association — a pleading demurred to liberally construed — allegations under which proof sufficient to sustain a cause of action may be given — facts should be stated according to their legal effect, not evidence — what complaint to require a stock exchange to admit a member to its privileges is sufficient.

Where general statements in a pleading are qualified by additional averments, they may be read with the qualified phrase for the purpose of determining, on demurrer, whether the statements are statements of fact or conclusions of law; this is true, even when the allegation without the qualified phrase would be a sufficient allegation of fact, whereas, with the qualification, it necessarily becomes a mere conclusion of the pleader.

Pleadings containing conclusions of law may, nevertheless, be sustained, where there are elements of fact mixed with the legal inference, from which the character of the contract or transaction upon which the action is based and the nature of the liability may be seen.

The mere fact of membership in a voluntary association does not, of itself, give that member rights of which the court may take judicial notice. The member has only such rights as the constitution and by-laws of the association give him.

On demurrer the pleading demurred to should not be construed strictly against the pleader, but all the facts stated therein, as well as those which, by reasonable intendment, may be implied therefrom, must be assumed to be true.

If a plaintiff, under the averments of his complaint, would be entitled to give the necessary evidence to sustain his cause of action, the complaint is not demurrable.

Facts may be stated according to their legal effect, and where the result to be stated is the result of other facts, the result of the facts, not those furnishing evidence thereof, should be stated.

The complaint in an action brought against the president of the Consolidated Stock and Petroleum Exchange of New York alleged that the exchange was a voluntary association composed of 1,546 members, and that the object thereof was to furnish facilities for the purchase and sale of certain commodities and securities; that there existed an independent corporation, all of the stockholders of which were members of the association, which corporation was organized for the purpose of holding for the association the title to certain property in which the members of the association met and transacted business; that said privilege of transacting business in such premises was of great value to the individual members thereof, and had a large established market value; that the association was the owner of a certain interest fund amounting to upwards of $400,000, to which the plaintiff had contributed largely; that membership in the association carried with it a valuable reputation and established the good name and fame of the member; that since the year 1892 the plaintiff had been and now is a member of the association in the active enjoyment of all the rights, privileges and property incident to said membership; that on October 5, 1900, the defendant association prevented and has continued to prevent the plaintiff from participating in the rights and privileges of membership and has refused and now continues to refuse to allow him to transact business on the floor of the exchange, by reason of which he has suffered damage in the sum of $50,000.

The constitution, by-laws, articles of association or other agreement, by virtue of which the plaintiff acquired his rights in the association, were not set forth.

He demanded judgment that he be declared a member of the association in full and good standing and that the defendant be restrained from preventing him from transacting business on the floor of the exchange and from interfering with the exercise of his rights and privileges of membership, and that he be awarded damages.

Held, that the complaint was not demurrable;

That the description of the purposes and object of the association and the maintenance of the building in which it conducted its business, and the relations of the members of the association, was a sufficient averment of the effect of the constitution under which the association did business;

That as the character of the association was set forth, it was a fair and reasonable intendment to be drawn from the complaint that the plaintiff had the right to participate in the affairs of the association and go upon the floor of the exchange, which were the rights alleged to have been violated by the defendant.

APPEAL by the defendant, Mortimer H. Wager, as president of the Consolidated Stock and Petroleum Exchange of New York, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York, on the 9th day of June, 1903, upon the decision of the court,

rendered after a trial at the New York Special Term, overruling the defendant's demurrer to the complaint.

Francis D. Pollak, for the appellant.

Egerton L. Winthrop, Jr., for the respondent.

Interlocutory judgment affirmed, with costs, upon the opinion in the court below, with leave to defendants to withdraw demurrer and to answer upon payment of costs in this court and in the court below.

The following is the opinion of CLARKE, J., delivered at Special Term:

CLARKE, J.:

This is a suit for an injunction and for damages brought by the plaintiff, as a member, against the defendant, as the president of the Consolidated Stock and Petroleum Exchange of New York. The defendant has demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The particular defect which the defendant points out is that the plaintiff fails to show the existence of rights in himself which he claims have been violated by the defendant, that the only allegations of rights existing in the plaintiff are mere conclusions of law. I am of opinion that this criticism, as to some of the allegations of the complaint, is well founded. The averments that "each of the members of said association is possessed, in virtue of said membership, of the title in common in and to the said real and personal property, and is the owner and holder, also, of the privilege and opportunity and business, not only in common with the other members of the said association, but also particular and exclusive to himself and growing out of his membership," and that "such property is owned and possessed and enjoyed by him in and through his said membership," are conclusions of law.

Upon a demurrer to a complaint which alleged "that by reason of the aforesaid facts, the plaintiff alleges, upon information and belief, that the above-named defendants were, at the times hereinafter named, copartners, doing and carrying on the business of banking under the name and style of the Home Savings Bank as aforesaid," Judge MARTIN said: "It will be observed that it is not an allegation that

the defendants were copartners * * * but an allegation that by reason of the aforesaid facts the plaintiff alleges, etc. Thus we see that it is an allegation of a conclusion based upon the facts already alleged and not the allegation of an independent fact." (*Seacord* v. *Pendleton*, 55 Hun, 579; S. C., *sub. nom. Merchants' Nat. Bank* v. *Pendleton*, 9 N. Y. Supp. 46.) Judge EARL, in *Sheridan* v. *Jackson* (72 N. Y. 170, 173), says: "The allegation that he (the plaintiff) was entitled to the possession of the land and to the rents and profits is a mere allegation of a conclusion of law. The facts should have been alleged from which such a conclusion of law could have been drawn." So, also, in other jurisdictions, an allegation that plaintiff is entitled without alleging the facts from which his title may be seen has been held to be a conclusion of law. (*Garner* v. *McCullough*, 48 Mo. 318; *Brown* v. *Phillips*, 71 Wis. 239.) Where general statements are qualified by additional averments they must be read with the qualifying phrase. This is true even when the allegation without the qualifying phrase would be a sufficient allegation of fact, whereas with the qualification it necessarily becomes a mere conclusion of the pleader. (*Page* v. *Boyd*, 11 How. Pr. 415; *Turner* v. *White*, 73 Cal. 299.) But pleadings containing conclusions of law may nevertheless be sustained where there are elements of fact, mixed with the legal inference, from which the character of the contract or transaction upon which the action is based and the nature of the liability may be seen. (Bliss Code Pl. § 213.) The question, therefore, presented is whether the complaint contains a statement of facts which, by substantive law, entitles the plaintiff to the aid of the court in his behalf against the defendant. (Phillips Code Pl. § 323; *Allen* v. *Patterson*, 7 N. Y. 476; *Bristol* v. *R. & S. R. R. Co.*, 9 Barb. 158.) The mere fact of membership in a voluntary association does not of itself give that member rights of which the court may take judicial notice. That a person acquires by his admission to membership only such rights as the constitution and by-laws of the association give him was established by *Belton* v. *Hatch* (109 N. Y. 593, 597). Under the rule that pleadings are not to be construed on demurrer strictly against the pleader, the facts stated in the complaint, as well as such as may by reasonable and fair intendment be implied from the allegations made, must be assumed to be true. (*Wenk* v. *City of N. Y.*, 171

N. Y. 607; *Coatsworth* v. *Lehigh Valley R. R. Co.*, 156 id. 451; *Sanders* v. *Soutter*, 126 id. 193; *Milliken* v. *Western Union Tel. Co.*, 110 id. 403.) The averments would be sufficient if, under them, the plaintiff would be entitled to give the necessary evidence to establish his cause of action. (*Rochester Ry. Co.* v. *Robinson*, 133 N. Y. 242, 246; *Berney* v. *Drexel*, 33 Hun, 34, 37.) The statement of the averments may be argumentative and the pleading deficient in technical language. (*Sanders* v. *Soutter*, 126 N. Y. 195; *Milliken* v. *Western Union Tel. Co.*, 110 id. 403.) Looking at the complaint, with these rules in mind, it will be seen that the defendant admits that the Consolidated Stock and Petroleum Exchange of New York is a voluntary association of 1,546 members, of which the defendant Wager is the president; that the purpose and object of the association is to furnish facilities for the purchase and sale of petroleum, stocks, bonds and other securities, agricultural and commercial products, ore, metals and other minerals; that the exchange performs the public function of establishing and announcing to the world constantly the values of various securities and properties; that there exists a New York corporation known as the Consolidated Stock and Petroleum Exchange Building Company, all the stockholders of which are members of the exchange, and only such members are interested in the building company; that the building company is a part of the defendant association, composed within the association, for the purpose of holding for the association the title of various real and personal property, situate within the county of New York, of the value of $500,000 and upwards, and in the building of the said company the members of the association have for many years met and congregated and do now meet and congregate for the transaction of business; that said privilege is of great value to the individual members of the said association and has a large established market value; that the association is possessed of and is the owner of a certain gratuity or interest fund of upwards of $400,000, to which plaintiff has largely contributed; that membership in the association carries with it, throughout the world, a valuable reputation and establishes the good name and fame of the member; that plaintiff has been since the year 1892 and now is a member of the exchange in the active enjoyment of all the rights and privileges and property incident to such

membership, which constitutes plaintiff's business; that on or about the 5th day of October, 1900, the defendant association, its officers, members, servants and agents prevented and now prevent this plaintiff in participating in the rights and privileges of membership in the association, and have refused and continue to refuse to allow him to go upon the floor of the exchange or to transact any business as a member, by reason of which he has suffered damage in the sum of $50,000. Wherefore, the plaintiff prays for judgment that he was and now is a member of the association in full and good standing; that the defendant be restrained from preventing his going freely upon the floor of the exchange and transacting business there, and from interfering with the exercise and enjoyment of all the rights and privileges of membership, and for damages. It will be observed that there is no specific mention in this complaint of the constitution, by-laws or articles of association, or other agreement, by virtue of which the plaintiff has acquired his rights, but I am of the opinion that the description of the purposes and object of the association and the maintenance of the building in which it conducts its business, and the relations of the members of the association, are a sufficient averment of the effect of the constitution under which the association does business. It is a well-established rule that facts may be stated according to their legal effect (*Rochester Ry. Co.* v. *Robinson*, 133 N. Y. 242, 246; *Brown* v. *Champlin*, 66 id. 214; *Thayer* v. *Gile*, 42 Hun, 268), and where the fact to be stated is the result of other facts, the resultant facts, not those furnishing evidence thereof, should be stated. (*Gleitsmann* v. *Gleitsmann*, 60 App. Div. 371; *Badeau* v. *Niles*, 9 Abb. N. C. 48; *Prickhardt* v. *Robertson*, 4 Civ. Proc. Rep. 112.) The constitution of the association or other agreement may well be evidence of the facts alleged. As the character of the association, in which the plaintiff for many years has been a member, is set forth, it is a fair and reasonable intendment to be drawn from the complaint that he has the right to participate in the affairs of the association and go upon the floor of the exchange, which are the rights alleged to have been violated by the defendant. *Young* v. *Eames* (78 App. Div. 229) was evidently followed by the pleader when this complaint was framed, although the sufficiency of such a complaint was not directly tested in that case. The form of complaint is evidently

chosen for the same purpose of intending to place upon the defendant the burden of sustaining the validity of the action of the association in preventing the plaintiff from going upon the floor of the exchange and exercising the rights of membership. I am unable to discover any reason for holding that this may not be done as the justification for the action of the association may very properly be set up in the answer by way of confession and avoidance. (*Baxter* v. *McDonnell*, 155 N. Y. 83, HAIGHT, J., at p. 100.)

Demurrer overruled, with the privilege to answer within twenty days upon payment of costs.

In the Matter of the Application to Compel FRANK E. RANDALL to Answer Certain Questions.

WILLIAM E. STRONG and Others, Appellants; FRANK E. RANDALL and THE WESTERN GAS AND FUEL COMPANY, Respondents

Commission to take testimony within the State, issued by a court of another State — duty of a witness to produce under a subpœna duces tecum, *and to identify, the books of a corporation — presumption of knowledge, as to corporate books of account, on the part of its secretary and treasurer — entries in such books, how far evidence of declarations and admissions — competency of questions asked of such a witness — how far considered on appeal from a ruling of the commissioner.*

Where a commission is issued out of an Ohio court, to a notary public in the State of New York, to take the testimony of the secretary and treasurer of a corporation which is a party defendant in an action brought in the Ohio court, and, pursuant to a subpœna *duces tecum*, the witness appears before the commissioner, bringing with him the cash book, journal and ledger of the corporation, which books contain accounts pertinent to the issues involved in the action, the witness may be required to identify the books themselves and the particular accounts contained therein which bear upon the issues.

The witness presumptively possesses knowledge of the contents of the books, and it is not essential, to make the accounts in question the subject of identification by him, that it should appear that he made the entries in the books or directed them to be made, or that he had actual knowledge of the transactions which appear therein or that the entries were made during the period of his incumbency in the office of secretary and treasurer.

Accounts and entries in the books of a corporation are competent as evidence of declarations and admissions upon the part of the corporation in a controversy between the corporation and a third party or corporation, and may be proved as such.

The competency of the questions propounded to the witness is to be determined, in the first instance, by the commissioner, and, upon a motion to compel the witness to answer questions propounded to him which the commissioner deemed competent, the court is not called upon to pass upon the competency of the evidence or its admissibility upon the trial of the action; it is sufficient if it appears that the testimony may be competent and is not entirely irrelevant to the subject-matter of the action.

Appeal by William E. Strong and others from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 23d day of October, 1903, denying the appellants' motion to compel Frank E. Randall to answer certain questions propounded to him as a witness before a commissioner.

Frank E. Blackwell, for the appellants.

Willard Parker Butler, for the respondent Randall.

Julius F. Workum, for the respondent The Western Gas and Fuel Company.

Hatch, J.:

An action was brought by minority stockholders of the Miami Gas and Fuel Company, a corporation created under the laws of the State of Ohio (hereafter called the Miami Company) in the Court of Common Pleas in the State of Ohio against the Western Gas and Fuel Company and others. The Miami Company had executed and issued bonds secured by a mortgage upon its property in Ohio for the sum of $1,000,000. All of these bonds are held and owned by the Western Gas and Fuel Company, a corporation organized under the laws of the State of Kentucky (hereafter called the Western Company). The petition in the action in Ohio avers, in substance, that the defendant, the Western Company, has from time to time taken moneys of the Miami Company to the amount of $1,406,000, for which no consideration was paid or given to the Miami Company. That it has also received for the express purpose of being applied to the payment of the mortgage and the interest thereof further moneys of the Miami Company, amounting to $250,000. These several sums, it is averred, should have been applied to the extin-

guishment of the bonds and the satisfaction of the said mortgage according to the terms thereof; that an action was brought to compel such application and the cancellation of the mortgage, and also to require the Western Company to account for the balance of the moneys received. The defendant, the Central Contract and Finance Company (hereafter called the Central Company) is a corporation created under the laws of the State of New Jersey, and it is averred that for the purpose of concealing the transactions the sum of $1,406,000 was first paid or deposited with that company and subsequently transferred by it to the Western Company. For the purpose of procuring the testimony of the defendant Frank E. Randall, who is the president of the Miami Company and the Central Company and the secretary and treasurer of the Western Company, the plaintiffs procured a commission to be issued out of the Court of Common Pleas of Montgomery county in the State of Ohio, directed to William C. Timm, Esq., a notary public, to take the testimony of the witness Randall. The latter appeared before the commissioner pursuant to a subpœna *duces tecum*. This subpœna the Western Company made a motion to vacate, the court denied the motion and directed the witness to appear in pursuance of such subpœna and produce the books called for therein. No appeal was taken from such order and the books were brought before the commissioner by the witness Randall. These books consist, so far as the same are involved in this appeal, of a single book, which the witness called cash book, journal and ledger of the Western Company, containing accounts of that company to January 1, 1898; also three books of account, to wit, the cash book, journal and ledger of the Western Company, containing the accounts of that company from January 1, 1898, to date. The purpose of the examination is to show that large sums of money were received by the Western Company from the Central Company and the Miami Company, applicable, as it is claimed, to the satisfaction of the bonds and mortgages of the Miami Company. It is claimed that the money of the Miami Company has been paid into the treasury of the Western Company in at least two ways. *First*, directly from the Miami Company by means of checks; and, *second*, through the agency of the Central Company. In order to conceal the transactions of the latter character it is claimed that the moneys were first withdrawn from the Miami Company and

deposited to the credit of the witness Randall and one Hanley, subject to their check, and by them, or one of them, paid or deposited to the credit of the Central Company, and by the latter turned over to the Western Company. The books of the Western Company being before the commissioner and in the presence of the witness, the following evidence was sought to be obtained from him: The identification and existence of an account in the first book, containing accounts from 1894 to January 1, 1898, purporting to show the money received and credited in the books as payments of the Miami Company to the Western Company; the identification and existence of an account purporting to show the payment of money received by the Western Company from the Central Company, which it is claimed should be credited to the Miami Company; the identification and existence of an account in the three books, covering transactions from January 1, 1898, to the commencement of the action, purporting to show moneys received by the Western Company from the Miami Company; the identification and existence of an account, purporting to show money received during the same period from the Central Company by the Western Company and claimed to be credited to the Miami Company; to point out and show the balance carried over and credited by the witness himself, or by his direction, from one of these accounts to another. The witness refused information of these accounts in any way, or to answer concerning them, or otherwise to refer to them, except to refresh his memory, and as his memory could not be refreshed by anything contained therein he declined to make any examination at all.

The foregoing points were all covered by several questions in a variety of form, which resulted in a limited answer upon the part of the witness and the refusal to answer further. To all of the questions objections were interposed by the Western Company and by the witness. The commissioner overruled the objections and directed the witness to answer, but, notwithstanding this ruling, the witness refused to answer, except in a limited way, or to read the entries from the books, or to identify the different accounts which he was asked to identify. When it became apparent that the plaintiffs were to be deprived of substantial information which they sought to obtain from the witness an adjournment was taken and a motion made at Special Term for an order directing the witness

to answer the questions which had been propounded to him. The court denied the motion, and from the order so entered this appeal is taken.

It was said in *Matter of Searls* (155 N. Y. 333) that what questions were pertinent to be propounded upon such an examination were to be determined in the first instance by the commissioner in like manner as such determination would be made by a justice of the peace in a trial before him, and that the commissioner was possessed of the same powers to enforce his decision as is possessed by a justice of the peace. It necessarily follows from this holding that when the commissioner determined that the questions were pertinent and proper and directed the witness to answer, it then became the duty of the witness to give such answer to the question as he was able, and in refusing to do so he was guilty of a contempt. It was said by Mr. Justice PATTERSON in *Matter of Randall* (87 App. Div. 245), which was an appeal from an order directing the deposit of these books with the commissioner: "If the person producing the books, in obedience to a subpœna, refuses to answer questions passed upon and allowed by the commissioner, and, under such circumstances, refuses to identify the books or the entries therein which are material to the case of the examining party, a remedy is afforded by law." The question does not turn upon whether the decision of the commissioner is right or wrong, but upon the authority of the commissioner to rule in the premises and to direct the witness to comply with the ruling; when he has done that it becomes the duty of the witness to obey the direction. The books which were produced before the commissioner were produced by the witness Randall; he was the secretary and treasurer of the company whose books he produced, and, therefore, entitled to the possession thereof, and, presumptively at least, is possessed of knowledge of what they showed, and it was competent for the plaintiffs to extract from the witness not only testimony that rested within the witness' memory, but in that connection transactions pertinent to the subject-matter of the action which appeared in the books themselves. Such is the effect of our holding in *Matter of Dittman* (65 App. Div. 343). For this purpose it was not essential that it should appear that the witness had made or directed to be made the entries in the books, or that he should have had actual knowledge

of the transactions which appeared therein, or that they were made during the period of his incumbency of the office of secretary and treasurer in order to make the accounts therein the subject of identification by him. (*First Nat. Bank of Whitehall* v. *Tisdale*, 84 N. Y. 655; *Rogers* v. *N. Y. & Brooklyn Bridge*, 11 App. Div. 141; affd. on opinion below, 159 N. Y. 556.) The books produced were books of the corporation and entries therein which bore upon the subject-matter of the issues involved in the action became a pertinent subject of inquiry. In order to make them competent testimony it is necessary that the books themselves be identified and the particular accounts therein which bore upon the issue. When the books have been identified, it is proper to have particular accounts pertinent to the issue identified and separated from other entries; and for this purpose the witness was a competent witness and was competent to identify the particular accounts which appeared in the books, no matter when or by whom they were made, if in fact they were accounts of transactions kept in the ordinary course of business in the books of the corporation. There can be no doubt but that accounts and entries in the books of a corporation are competent as evidence of declarations and admissions upon the part of the corporation in a controversy between the corporation and a third party or corporation, and may be proved as such. (*Sigua Iron Co.* v. *Brown*, 171 N. Y. 488; *Matter of Dittman, supra; Kohler* v. *Lindenmeyr*, 129 N. Y. 498.)

We are not, however, called upon to pass upon the competency of the evidence sought to be elicited from the witness, or its admissibility upon the trial of the action. That will become a matter for determination by the Ohio court when the commission shall be returned to it. For present purposes it is sufficient if it appear that such testimony may be competent, and so far as the examination is not entirely irrelevant to the subject-matter of the action, the court will not, nor is it called upon to pass upon the strict legality and competency of the evidence sought to be elicited. In the first instance, such questions are left for determination by the commissioner and it is presumed that such officer will limit the examination within legal bounds. It is enough for us now to say that the testimony sought to be elicited and the identification of evidence, which may be used, may be competent and may be received upon the

trial; beyond reaching this conclusion, we are not required to go. This is not a proceeding to compel a discovery of the books. It is the examination of a witness in form and manner the same as though he were called at the trial. In fact it is a part of the trial, made necessary by the absence of the witness and the books from the jurisdiction of the court issuing the commission. Under such circumstances it cannot be doubted but that an officer of the corporation, possessed of the books and producing them, may be examined with respect to their contents and required to identify accounts therein, if competent upon the subject-matter of the issue. We reach the conclusion, therefore, that the questions were competent and proper, and that the witness should have obeyed the direction of the commissioner, answered the questions and identified the accounts. This result leads to a reversal of the order of the Special Term.

The order should, therefore, be reversed, with ten dollars costs and disbursements, and the witness directed to appear before the commissioner and answer the questions propounded to him, so far as he shall be directed so to do by the commissioner.

O'BRIEN, INGRAHAM and MCLAUGHLIN, JJ., concurred

VAN BRUNT, P. J. (concurring):

I concur in result of Mr. Justice HATCH's opinion only. I cannot concur in the doctrine that a citizen of this State when examined before a foreign commissioner can be compelled to answer every question which the foreign commissioner may hold to be proper, no matter how immaterial or irrelevant or improper it may be.

Order reversed, with ten dollars costs and disbursements, and witness directed to appear and answer as stated in opinion.

CLARENCE D. BALDWIN, Respondent, *v.* JOHN J. McGRATH, Appellant, Impleaded with TERENCE McDONNELL, Defendant.

Specific performance of a contract to convey land containing a provision that it shall be void if the vendor does not receive title on or before a specified date — the vendee's refusal to accept the title, because of defects therein, at that date terminates his rights thereunder, although the defects are thereafter cured.

September 12, 1902, Terence McDonnell made a contract with one McGrath, by which he agreed to convey to McGrath certain real estate on October 1, 1902, and at the same time McGrath entered into a contract with one Baldwin, by which he agreed to convey the premises in question to Baldwin at the time and place mentioned in his contract with McDonnell. At the time of the execution of this contract Baldwin paid $500 on account of the purchase price.

The contract with Baldwin contained the following provision: "This contract is made upon the condition that the said party of the first part (McGrath) shall receive the title to said premises on or before the first day of October, one thousand nine hundred and two, and if he fails to receive such title by that date, then this contract shall become null and void, and said party of the first part in that event agrees to return the said sum of five hundred dollars to the said party of the second part."

The parties to the two contracts met at the time and place specified. McGrath's attorney then handed to Baldwin's attorney a list of objections to McDonnell's title to the property. Baldwin's attorney stated that he thought the objections could be cured within a week, but McGrath replied that he would not grant a single hour's extension; that he wanted to close then. Baldwin's attorney refused to pass the title in the face of the objections, and McGrath then offered to return the $500 which Baldwin had paid to him upon the execution of the contract. Baldwin declined to accept the money and went away.

The objections to the title were subsequently cured and McGrath took title to the property October 14, 1902.

Held, that McGrath could not be compelled to specifically perform his contract to convey the property to Baldwin;

That while McGrath was bound to act in good faith and accept on October 1, 1902, a marketable title, if tendered to him by McDonnell, he was not bound to accept a title that Baldwin would not accept as a compliance with his contract;

That, in the absence of bad faith on the part of McGrath, the latter's failure to receive title on October 1, 1902, justified him in insisting upon the quoted provision of the contract.

APPEAL by the defendant, John J. McGrath, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 20th day of June, 1903,

upon the decision of the court, rendered after a trial at the New York Special Term, decreeing the specific performance of a contract for the sale of real estate.

Franklin Pierce, for the appellant.

Lucius H. Beers, for the respondent.

INGRAHAM, J.:

On September 12, 1902, the defendant McGrath made a contract with the defendant McDonnell whereby McDonnell agreed to convey to McGrath certain real estate on Thirty-fifth street, between First and Second avenues, in said city, at noon on October 1, 1902, at the office of the attorney for McGrath. At the same time McGrath entered into a contract with the plaintiff by which McGrath agreed to convey to the plaintiff the Thirty-fifth street property which was to be conveyed to him under his contract with McDonnell, to be performed at the same time and place as was the contract between McGrath and McDonnell. The plaintiff paid $500 on account of the purchase price on the execution of this contract. By this contract the defendant McGrath, in consideration of $8,000, agreed upon the condition thereafter expressed to sell and convey to the plaintiff the real property therein described. The condition was that "This contract is made upon the condition that the said party of the first part (McGrath) shall receive the title to said premises on or before the first day of October, one thousand nine hundred and two, and if he fails to receive such title by that date, then this contract shall become null and void, and said party of the first part in that event agrees to return the said sum of Five hundred dollars to the said party of the second part" (plaintiff). On the first of October the parties to these two contracts met at the time and place specified, the plaintiff being represented by his attorney. The defendant McGrath was present with his attorney, and McDonnell was present with his attorney. McGrath's attorney then handed to the plaintiff's attorney a paper containing a list of objections to McDonnell's title to the property which he had received from one of the title companies. Upon the receipt of these objections, the attorney who then represented the plaintiff stated that these objections could be cured and that he thought possibly one week's time would be sufficient to clear the title up.

After some discussion, McGrath said that he would not give a week nor a day nor one hour's extension; he wanted to close then. The attorney who represented plaintiff testified that plaintiff was ready to take title if it was a perfect title but he determined it was not a perfect title; and Mr. Kersheedt testified that plaintiff's attorney said he would not pass title in the face of the objections, and wanted an adjournment. McGrath then said he wanted to return the $500 that had been paid by plaintiff upon the execution of the contract, in reply to which the plaintiff's attorney said that he advised the plaintiff not to accept, whereupon the plaintiff and his attorney left the office. The objections to the title were subseqnently overcome, so that the defendant McGrath took title to the property on the fourteenth day of October. Upon this evidence the court below gave judgment requiring the defendant McGrath to specifically perform this contract and convey the property to the plaintiff upon payment of the balance of the amount required by the contract to be paid, and from that judgment McGrath appeals.

The question presented is as to the effect to be given to this clause of the contract to which attention has been called, for it seems to be conceded that if that clause had not been in the contract the plaintiff would be entitled to a decree of a specific performance. This provision was evidently put in the contract to protect McGrath so that if for any reason McDonnell failed to comply with his contract McGrath should only be responsible for a return of the money paid. McGrath's agreement to convey was upon the condition that he should receive title to the premises on or before October 1, 1902, and it was expressly agreed that if he failed to receive title by that date the contract should become null and void. McGrath did not receive title on or before October 1, 1902, and thus by the express terms of the contract it became null and void. McGrath was undoubtedly bound to act in good faith. He could not arbitrarily refuse to accept title to the property from McDonnell on the first of October; repudiate his contract with the plaintiff, subsequently accept a conveyance from McDonnell, and repudiate his obligation to convey to the plaintiff. McGrath was bound to accept title to the property from McDonnell if McDonnell was ready and willing to convey, and to convey it to the plaintiff if plaintiff was willing to accept the title that McDonnell was able to

convey. Now, on the day when the parties met to complete this contract, the plaintiff was there ready to complete. McGrath's attorney then presented certain objections to the title. Plaintiff's representative refused to accept a conveyance in the face of these objections, and this refusal certainly justified McGrath as between him and the plaintiff in refusing to accept a conveyance from McDonnell. Plaintiff requested an adjournment; but McGrath was under no obligation to adjourn the closing of the contract. By the express agreement between the parties, the contract was to be null and void if McGrath should not receive the title on or before October first, and in that event his obligation was at an end. While he was bound to act in good faith and accept a marketable title if tendered to him by McDonnell, he was not bound to accept a title that plaintiff would not accept as a compliance with the contract. The objections to McDonnell's title to the premises are not printed in the record and we cannot say that they were not substantial, as plaintiff's attorney refused to pass the title in the face of these objections. This provision was undoubtedly inserted in the contract for McGrath's protection. He could waive it, but he also could insist upon it. He did insist upon it, tendered back the consideration that he had received, and thus under the express provision of the contract it was "null and void." The parties had expressly provided what would be the effect of such a condition, and in the absence of bad faith on McGrath's part, of which there is no allegation or proof, I can see no reason why this provision should not be given effect. The parties had made time the essence of the contract, and when it became "null and void" by its express conditions, the equitable interest that plaintiff had acquired in the property was divested and plaintiff had no further interest except his right to the $500 which he had paid upon the execution of the contract.

It follows that the judgment must be reversed and a new trial ordered, with costs to appellant to abide event.

VAN BRUNT, P. J., PATTERSON and HATCH, JJ., concurred.

LAUGHLIN, J. (concurring):

I concur with Mr. Justice INGRAHAM.

On the day specified for performance the appellant had not

acquired title from McDonnell. There were certain defects in McDonnell's title which the attorney for the appellant considered rendered the title unmarketable. These defects were discussed in the presence of the attorney for the plaintiff who agreed that the title was defective; and the attorney for the appellant in his presence refused to take the title. Neither the plaintiff nor his attorney offered to take the title from the appellant in the condition it then was without these defects being removed or to take an assignment of his interest in the contract with McDonnell. By the agreement between the plaintiff and the appellant the latter was to give a full covenant warranty deed. The attorney for the plaintiff suggested an extension of time for performance with a view to having the title perfected; but the appellant and his attorney refused to consent to an adjournment beyond the time specified for performance. There is no evidence that the appellant was guilty of negligence or was in any manner responsible for the title not being perfected at the time specified for performance. It is not disputed that the title at that time was not marketable. The attorney for the appellant tendered to the plaintiff's attorney the down payment that had been made to apply on the contract, but it was not accepted. The plaintiff then brought this action upon the theory that time was not of the essence of the contract, and he joined McDonnell as a party defendant and demanded that he specifically perform his contract with appellant. During the pendency of the action the title was perfected and the premises were conveyed to appellant by McDonnell. The plaintiff then served a supplemental complaint alleging such subsequent perfection of title and performance by McDonnell.

I am of opinion that by virtue of the provision of the contract quoted, time was made the essence of the contract. The plaintiff would not have been obliged to accept title after the 1st day of October, 1902. The obligation must be mutual. If the plaintiff could not be compelled to take title subsequently the appellant cannot be compelled to give title. The plaintiff's willingness or desire to have the matter held open and to take title later cannot alter the legal rights and obligations of the parties. Nor are the plaintiff's rights enlarged by the fact that appellant subsequently took title from McDonnell which he might have refused. It may be that the appellant was not anxious to have the title perfected or to perform

his contract with the plaintiff, but he stands upon his legal rights and they are not affected by his motives.

It follows that the judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

VAN BRUNT, P. J., and HATCH, J., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

NATHANIEL T. BACON, Appellant, v. IGNATIUS R. GROSSMANN, Respondent.

Execution against the person — the clerk is not authorized to insert a provision authorizing it in the postea — it must be determined from the complaint and the attorney must issue it at his peril.

A county clerk, in making up the judgment roll in an action tried in a court of record, has no right to insert in the postea of the roll a statement that the plaintiff is entitled to enforce the judgment by an execution against the defendant's person, and such a statement will, upon motion, be stricken out.

In such a case the question whether the action is one in which an execution against the person can issue is to be determined from the allegations of the complaint, and the responsibility of making the determination must be assumed by the plaintiff's attorney and cannot be placed upon the clerk.

APPEAL by the plaintiff, Nathaniel T. Bacon, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 14th day of November, 1903, modifying a judgment in favor of the plaintiff, entered in said clerk's office on the 22d day of October 1903.

Selden Bacon, for the appellant.

Gormly J. Sproull, for the respondent.

VAN BRUNT, P. J.:

As appears by the clerk's minutes, this action was tried by the court and a jury, and a verdict rendered by direction of the court in favor of the plaintiff. Thereupon the judgment roll was made

up by the clerk, the postea in which contained recitals that it appeared from the record that this action was brought to recover money had and received by the defendant to the use of the plaintiff and his assignors, and it being alleged in the complaint that the money sued for was received by the defendant in a fiduciary capacity, and that he converted the same to his own use, and it appearing from the pleading that this is an action in which the plaintiff is entitled to satisfy his judgment by execution against the body of the defendant, etc., it is adjudged that the plaintiff recover of the defendant a certain sum of money, and that said plaintiff may enforce the judgment against the person of the defendant, and that the plaintiff have execution therefor.

A motion was made to strike out these recitals in the postea of the judgment roll, which motion was granted, and from the order thereupon entered this appeal is taken.

It is claimed upon the part of the appellant that the propriety of inserting such a provision in the judgment seems to be thoroughly established by the Court of Appeals, citing the case of *Moffatt* v. *Fulton* (132 N. Y. 507). An examination of the record of this case shows that the question litigated there came up in an entirely different form from that presented to this court upon this appeal. There was no question of regularity whatever brought up upon the appeal in that case. The question litigated there was whether, under the allegations of the complaint, it appeared that the defendant had received the money in a fiduciary capacity and an execution against the person could issue. It was held by the General Term that the complaint did not authorize an execution against the person, and that, therefore, the provisions of the postea of the judgment roll allowing such execution were improper. The Court of Appeals decided that the complaint did set out a cause of action which, upon a recovery, allowed the issuing of an execution against the person.

There was no question before the court as to the regularity of the insertion in the postea of any such provision. Questions of regularity can never be raised upon an appeal. The only way in which that question could be raised would be by a motion to strike from the postea of the judgment roll the words adjudging execution against the person, as was done in the case at bar. It is to be deter-

mined from the allegations contained in the complaint as to whether the action is one in which an execution against the person can issue. Under the provisions of section 179 of the Code of Procedure and of section 549 of the Code of Civil Procedure, as first enacted by chapter 448 of the Laws of 1876, in reference to arrest, there were certain actions where an order of arrest might issue because of the nature of the cause of action. By section 550 of said Code of Civil Procedure there were certain other actions where, in consequence of facts extrinsic to the cause of action, an order of arrest might issue, and in those cases the right to the order of arrest was established by affidavit, and where it was so established an execution against the person might issue upon the judgment. But in those cases in which the right to issue an execution depended upon the nature of the cause of action, such procedure does not seem to have been necessary. Subsequently, by chapter 542 of the Laws of 1879 and chapter 672 of the Laws of 1886, the provisions of the Code of Civil Procedure were amended by the consolidation of sections 549 and 550, so that if the plaintiff desired an execution against the person because of extrinsic facts, he was bound to allege those facts in his complaint and prove them upon the trial, but in case of failure to prove those facts upon the trial he was not prevented from bringing a subsequent action to recover upon the debt. There is no provision of the Code of Civil Procedure which in any way authorizes the clerk to determine the proposition as to whether the cause of action is of such character as to authorize the issuance of an execution against the person or not. That the attorney must take the responsibility of, and it cannot be put upon the clerk.

In the Municipal Court, where the pleadings may be oral, the law requires when an execution can be issued against the person that the judgment of the justice must so state, and then the clerk must enter such fact in the docket. (See Laws of 1902, chap. 580, §§ 145, 251.) In the Code of Civil Procedure there is no such provision relating to courts of record, showing that the allegations of the complaint must determine whether execution against the person can issue, and there is no provision authorizing any action of the clerk upon the subject. In the lower court mentioned, where the pleadings may be oral, of course the record contains nothing to

indicate whether the action is of that character or not, and hence there must be a judicial direction.

We think, therefore, that the order was correct and should be affirmed, with ten dollars costs and disbursements.

O'BRIEN, INGRAHAM, MCLAUGHLIN and LAUGHLIN, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

THE TRUST COMPANY OF NEW YORK, Respondent, v. THE UNIVERSAL TALKING MACHINE COMPANY and Others, Appellants.

Reformation of a written instrument — it must be based on mutual mistake or the mistake of one party induced by the misrepresentations of the other — mortgage by a corporation not conforming to a resolution authorizing it — a complaint not alleging knowledge by its stockholders of such resolution — a demand for the execution of assignments of patents under a covenant to execute instruments of further assurance — it must be made before suit — failure of the mortgagor to refile a chattel mortgage.

A party seeking the reformation of a written instrument is bound to establish, either that it was executed under a mutual mistake of fact, or that it was executed under a mistake upon the one side induced by fraudulent representations upon the other side.

The trustee designated in a trust mortgage brought an action to procure a reformation of the mortgage so that the provisions thereof should conform to certain resolutions passed by the directors of the mortgagor company directing the mortgage.

The complaint alleged that the officers of the mortgagor corporation fraudulently, and with intent to deprive the bondholders of their rights, caused the draftsman of the mortgage to omit therefrom certain provisions which the resolutions passed by the directors provided that it should contain; that one of the bondholders purchased such bonds in reliance upon the resolutions passed by the directors.

The complaint further alleged that the holders of two-thirds of the stock of the corporation assented to the execution of the mortgage, but it did not allege that the consenting stockholders knew of the resolutions or were mistaken in regard to the terms of the mortgage.

Held, that the plaintiff was not entitled to a reformation of the mortgage, as the element of mutual mistake was absent and as the allegation of fraud on the part of the officers of the mortgagor corporation meant nothing in view of the allegations regarding the consent of the stockholders;

That the trustee was not entitled to maintain an action to compel the mortgagor corporation, under a covenant to execute instruments of further assurance,

to execute additional assignments and transfers of patent rights, covering applications for patents which had ripened into patent rights subsequent to the execution of the mortgage, where the complaint contained no allegation that any demand was ever made upon the mortgagor corporation for the execution of any instrument of further assurance.

The failure of the mortgagor corporation to refile the trust mortgage as a chattel mortgage does not confer any right of action upon the trustee, where it does not appear that any creditor has acquired any rights superior to the mortgage as the result of the failure to refile it, or that it was the duty of the defendants to refile the mortgage.

APPEAL by the defendants, The Universal Talking Machine Company and others, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 10th day of July, 1902, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the defendants' demurrer to the plaintiff's complaint.

Peter B. Olney, for the appellants.

Henry T. Fay, for the respondent.

VAN BRUNT, P. J.:

This action was brought to reform a mortgage executed by the defendant, the Universal Talking Machine Company, to the plaintiff as trustee to secure certain bonds of the defendant, the Universal Talking Machine Company; also to compel the defendants to execute certain additional assignments and transfers of certain patent rights and trade marks to the plaintiff as trustee under such mortgage; and also that the defendant corporation might be required to execute and deliver a new mortgage assigning and transferring to the plaintiff as trustee for the security of the bonds aforesaid all of the property, patents, patent rights, trade marks and contracts mentioned in the complaint, and embodying all the terms, provisions and conditions contained in the resolutions in the amended complaint set forth.

The amended complaint, after alleging the incorporation of the plaintiff and of the defendant, the Universal Talking Machine Company, and that said company was the owner and possessor of certain personal property consisting of machinery, etc., and certain

patents, inventions and discoveries, alleged that at a meeting of the board of directors of the defendant, the Universal Talking Machine Company, duly held on the 30th of October, 1900, the following resolutions were unanimously adopted, to wit:

"*Resolved*, That this company make its mortgage, assignment or deed of trust covering its patents, patent rights, machinery, trade-marks, fixtures and property; other than goods, wares and merchandise, and current bills and accounts receivable; and that it likewise execute and deliver all necessary or proper assignments and transfers, separate and distinct from such mortgage or deed of trust, suitable to be recorded for the purpose of giving record title or filed for the purpose of giving notice of the transfer, and change of possession or either, the same to be given as a part of and in connection with such mortgage or deed of trust. That such mortgage or deed of trust be executed to The Trust Company of New York, as Trustee, upon condition that it secure the payment of thirty thousand dollars ($30,000) first mortgage, five per cent. gold bonds, payable in five (5) years from the date thereof, with interest semi-annually; that such bonds be in the issue form and substantially as follows, viz." (Here follows in the resolution a full copy of the said bond, coupon, and trustee's certificate thereon.)

"That the mortgage or deed of trust, so as aforesaid to secure such bonds, be executed in the usual form, with authority to the trustee therein named to take possession of the property therein described or any portion thereof, should such trustee at any time deem the security of such bonds inadequate or unsafe and with power in such trustee likewise to conduct the business of the Company by or through the use of said property in its discretion.

"That the officers of the Company be authorized and directed to execute such mortgage or deed of trust and the bonds aforesaid, and such additional or supplemental documents and instruments as may be requisite or advised by counsel, for the purpose of effectuating this resolution; all of the aforesaid matters and things to be and become operative and effectual upon the consent, authorization and ratification of the same by the stockholders of the Company, as the same by statute or by law may be required."

The plaintiff alleged that thereupon the said defendant, the

Universal Talking Machine Company, with the consent of the stockholders owning at least two-thirds of the stock of the corporation, executed and delivered to the plaintiff a certain mortgage of said property, patents and patent rights, etc., then owned by it to secure the bonds aforesaid, which mortgage was on the 15th of December, 1900, duly filed in the office of the city clerk of the city of Yonkers, that being the defendant's principal place of business; that thereupon bonds were issued, $20,000 of which were purchased by one Lillie H. Seaman and the remaining $10,000 were held by one George H. Robinson as trustee; that the coupons on said bonds had been paid, but no part of the principal had ever been paid.

The complaint further alleged upon information and belief that said Lillie H. Seaman, the owner and holder of $20,000 of said bonds secured by said mortgage, agreed to and did purchase the same, with full knowledge of and relying upon the resolutions adopted by the defendant, the Universal Talking Machine Company, and understanding and believing that said mortgage contained all the terms and conditions and was drawn in accordance with the agreement and plan contained and set forth in said resolutions; but that in fact said mortgage was not so drawn, but, without the knowledge or consent of said Lilie H. Seaman, the defendant George H. Robinson or some one or more of the officers of said defendant, the said Universal Talking Machine Company, fraudulently and intentionally, and with intent to deprive the purchasers of the bonds of the rights intended to be conferred upon them in accordance with said resolutions, and in violation of the power and instructions conferred upon them by said resolutions, caused the draftsman who drew said mortgage to omit from said mortgage and not to embody therein any provision authorizing the trustee therein named to take possession of the property therein described or any portion thereof should said trustee at any time deem the security of such bonds inadequate or unsafe.

The complaint further alleged that the plaintiff accepted the trusteeship under said mortgage upon the belief and understanding that the same had been drawn in accordance with the agreement between the mortgagor company and the purchaser of the bonds and was satisfactory to them, and without any knowledge that its terms did not correspond to said resolutions.

The complaint further alleged that at the time said mortgage was executed the various patent rights which it was intended to convey as security were many of them in the shape of applications for patents; and that they had subsequently ripened into patents, and that under the covenants for further assurance the plaintiff is entitled to a formal assignment of the patents to it; and that no assignment or other instruments transferring to the plaintiff as trustee any such patent rights and trade marks had ever been executed and delivered to the plaintiff by said defendant company save and except the mortgage aforesaid.

The complaint further alleged a certain reorganization agreement, and that certain judgments had been obtained against the said Universal Talking Machine Company, and that while the said mortgage was in full force the sheriff sold all the personal property of said defendant including the patents, patent rights and trade marks aforesaid to the defendant Edward S. Innet; and that said Innet in purchasing the property aforesaid acted in pursuance of said plan of reorganization, and that the Universal Talking Machine Company has executed assignments and transfers of said patents, patent rights and trade marks to said Innet.

The complaint further alleged that the plaintiff duly demanded of said Innet the possession of said property and an assignment and transfer of said patents, patent rights and trade marks, but that he refused to comply with said demand; also that a demand has been duly made upon the officers of the Universal Talking Machine Manufacturing Company and of the Universal Talking Machine Company that a new and proper mortgage in accordance with the resolutions aforesaid be executed and delivered to plaintiff to secure said issue of bonds, but that they have failed and refused to do so.

The complaint further alleges that the Universal Talking Machine Company has failed to refile the mortgage within thirty days prior to the expiration of a period of one year from the date of its filing, whereby said mortgage has ceased to be a valid and subsisting lien against any parties purchasing said properties or any parts thereof without the knowledge of said mortgage.

Thereupon the plaintiff prayed for the relief above stated.

It is claimed upon the part of the plaintiff that it has made out a case coming within the principle laid down in *Haack* v. *Weicken*

(118 N. Y. 67). But we fail to find that it has in any way complied with the rule illustrated by the case cited. In order that there may be a reformation of an instrument the plaintiff is bound to establish either that it was executed under a mutual mistake of fact or that it was executed under a mistake upon the one side induced by fraudulent representations upon the other. There is no allegation whatever in the amended complaint bringing the case within the rule above cited. The only allegation in the complaint is that Lillie H. Seaman, the owner of $20,000 of these bonds, knew of the resolutions and, relying upon the resolutions, purchased the same. There is no allegation that the stockholders, who consented to the execution of the mortgage, consented to the execution of any mortgage except that which was executed. It is perfectly clear that the board of directors could resolve as much as they pleased, but, until the stockholders assented to the mortgage drawn in accordance with the terms contained in the resolutions, the officers would have no power whatever to execute the same. Under the allegations of the complaint the only mortgage to which the stockholders assented was the mortgage which was executed. There is no allegation that they were mistaken in regard to the terms of the mortgage; neither was there any allegation that they knew anything about the resolutions. Hence, the one element of mutual mistake is absent, and the prior allegation of fraud means nothing in view of the positive allegation in regard to the consent of the stockholders.

In regard to the claim that the defendant, the Universal Talking Machine Company, was required under its covenant, for further assurance, to execute additional assignments and transfers of patent rights where applications for patents had ripened into patent rights subsequent to the execution of the mortgage, the allegations are insufficient to justify any such relief. There is no allegation whatever that any demand has been made upon the Universal Talking Machine Company for the execution of any instrument of further assurance. It is true that it is alleged that the plaintiff has demanded of Innet, who was in possession of the property, that he should assign the same, and of his refusal to comply with such demand. But it is clear that this demand was not one founded upon the covenant of further assurance, but was founded upon the claim that, in consequence of the resolutions, the plaintiff was entitled to

the possession of the property and to an assignment of the patent rights. The same is true with regard to the Universal Talking Machine Manufacturing Company and the Universal Talking Machine Company. The allegations in regard to the demand upon them was that they should execute a new and proper mortgage in accordance with the resolutions aforesaid, clearly referring to the alleged right to a reformation of the mortgage in question.

It is difficult to see what cause of action the plaintiff had by reason of the failure upon the part of the defendants to refile the mortgage. There is no allegation whatever, in the first place, that any creditor has acquired any rights superior to the mortgage as a result of its want of filing. All those persons who, it is alleged, became creditors of the company became such while the mortgage was in full force under the proper filing, and Innet's title was acquired under similar circumstances. Besides, nothing is shown making it the duty of the defendants to refile this mortgage.

It does not appear, therefore, that any facts have been set forth in the complaint which would entitle the plaintiff to the relief demanded.

The judgment should be reversed, with costs, and the demurrer sustained, with costs, with leave to amend upon payment of costs in this court and in the court below.

O'BRIEN, INGRAHAM, McLAUGHLIN and LAUGHLIN, JJ., concurred.

Judgment reversed, with costs, and demurrer sustained, with costs, with leave to amend on payment of costs in this court and in the court below.

WILHELMINA BENTE, Respondent, *v.* METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Negligence — injury, from the sudden starting of a street car, to one alighting therefrom — charge as to the burden of proof in reference to the cause of the sudden starting of the car.

The law imposes upon a common carrier an obligation to give to its passengers an opportunity to alight from the car, and a failure to perform that duty constitutes negligence.

In an action brought to recover damages for personal injuries, the plaintiff gave evidence tending to show that she was a passenger upon one of the defendant's street cars, and that while she was alighting from the car after it had come to a stop, it started forward with a jerk, throwing her into the street.

The conductor of the car testified that the place in question was a regular stopping place, but that the plaintiff stepped off the car backwards before it had come to a full stop, although he warned her to wait until the car stopped.

Held, that a charge "that if the jury find the car had stopped and that Mrs. Bente was preparing to alight and the car gave a start or jerk before she had a reasonable opportunity to alight, unless this start or jerk is satisfactorily explained by the defendant, it was guilty of negligence, and it was not incumbent upon the plaintiff to prove what caused the start or jerk," was proper;

That such charge was not susceptible of being construed as a charge that, if the jury found that the plaintiff's version of the accident was true, the defendant was liable as a matter of law.

LAUGHLIN, J., dissented.

APPEAL by the defendant, the Metropolitan Street Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 16th day of May, 1903, upon the verdict of a jury for $3,000, and also from an order entered in said clerk's office on the 13th day of May, 1903, denying the defendant's motion for a new trial made upon the minutes.

Arthur Ofner, for the appellant.

Carlisle J. Gleason, for the respondent.

INGRAHAM, J.:

I do not think that there was error that would justify a reversal of this judgment. The defendant insists that the verdict was against the weight of evidence. The plaintiff was a passenger upon a car operated by the defendant and she fell to the street in getting off the car opposite the depot of the Harlem Railroad Company in the city of New York. She testified positively that the car came to a stop; that as she started to get off the car it started forward with a jerk and she was thrown into the street. Her evidence was not corroborated. For the defendant the conductor testified that the place at which the plaintiff fell was a regular stopping place for cars of the defendant's line and that they usually stopped there without a signal; that when the plaintiff fell the car had not come to a full

stop and that he warned the plaintiff to wait until the car stopped; that he started towards her to take hold of her; that the first thing he knew, before he could get to her, she stepped off backwards and she was on the ground and that he got off and helped her up; that after the plaintiff fell the car went about five feet and then it stopped; that before plaintiff fell off the witness had called out the Central station. The motorman testified that he did not bring his car to a stop at or about the Harlem entrance and then suddenly start on again. Two newsboys who were in the vicinity corroborated the testimony of the conductor, but there are circumstances connected with their testimony that render its credibility a question for the jury. A police officer also testified that when the plaintiff fell the car was moving, which is quite consistent with the plaintiff's testimony, as she says she fell because of the sudden start of the car, and the officer does not testify that the car had not stopped before the plaintiff fell as she attempted to get off. The testimony of the conductor that the plaintiff stepped off backwards is not entirely consistent with the testimony of the other witnesses for the defendant. It was also proved that at this point there was a down grade and that the car would start forward on its own momentum if the brake was taken off. Considering these circumstances and the testimony given by the several witnesses for the defendant, I think as the jury were justified in believing the plaintiff's testimony as they did believe it, we are not justified in saying that it was so clearly against the weight of evidence that we should disregard the verdict.

The only other error pointed out by the defendant is presented by an exception to a charge of the learned trial judge in answer to a request to charge made by the plaintiff's counsel. The learned judge had charged the jury that "The essential contention of the case, as I said at the outset, is that the plaintiff was hurt because of a sudden jerk of the car. If there was no such jerk then her case fails. * * * So that the sole question for you to determine is whether this accident was caused while the plaintiff was getting off the car, after it had come to a full stop (and before a reasonable opportunity had been given to her to get off), by a sudden forward jerk of the car resulting from some act of the defendant's servants. Of course, if this was an accident pure and simple the plaintiff cannot recover. The defendant is not liable for accidents pure and simple.

It is only liable for accidents caused by the negligence of its servants. So you must find before you give the plaintiff a verdict that the car had come to a full stop, that before the plaintiff had a reasonable opportunity to get off the defendant's servant caused the car to be jerked forward and that this jerk made her fall." The plaintiff's counsel, after the charge was completed, presented to the court his second request. That request is not in the record, but the court, answering, said: "That I have charged. I will modify what I have charged with respect to the second and third propositions, to this extent: I do charge that if the jury find the car had stopped and that Mrs. Bente was preparing to alight and the car gave a start or jerk before she had a reasonable opportunity to alight, unless this start or jerk is satisfactorily explained by the defendant it was guilty of negligence, and it was not incumbent upon the plaintiff to prove what caused the start or jerk," and to this the defendant excepted. This charge of the court is treated by the defendant as a charge to the jury that if they find that the plaintiff's version was true, that the defendant was liable as a matter of law and that was error under the case of *Kellegher* v. *Forty-second St., etc., R. R. Co.* (171 N. Y. 309). The court had already charged the jury that the one question for them to determine was whether the plaintiff in getting off the car, before she had an opportunity to alight, was thrown to the street by a jerk of the car caused by the employees of the defendant, and to that there had been no objection, and no request to modify that instruction was made by the defendant's counsel. The modification by the court in answer to the second and third requests was simply that if the jury found that the car had stopped, and as the plaintiff was preparing to alight the car gave a start or jerk before she had a reasonable opportunity to alight, unless this start or jerk was satisfactorily explained by the defendant it was guilty of negligence, and it was not incumbent upon the plaintiff to prove what caused the start or jerk.

Considering the relation that exists between a common carrier and its passenger and the duty that is by law imposed upon the carrier of allowing a passenger a reasonable opportunity to alight, I think that if the car stops at a usual stopping place for the purpose of allowing passengers to alight and a passenger in the act of alighting is thrown from the car by its suddenly starting, that there is neglect

to perform the duty imposed upon the carrier. That the law imposes upon a common carrier an obligation to give to its passengers an opportunity to alight from the car after the car has stopped for that purpose, and that a failure to perform that duty constitutes negligence is, I think, the settled law of this State; and this was all that the court charged. It did not charge, as in the case of *Kellegher* v. *Forty-second St., etc., R. R. Co.* (*supra*) that if the jury believed the witnesses called by the plaintiff who had testified to the circumstances under which the accident happened, that the act of the conductor was a negligent act and such an act as would warrant a cause of action on behalf of the plaintiff; but in this case the court told the jury that it was negligence on behalf of the defendant to start the car while a passenger was about to alight when the car had stopped for the purpose of allowing the passenger to alight; and the court had left it to the jury to say whether the plaintiff was free from contributory negligence. In *Martin* v. *Second Ave. R. R. Co.* (3 App. Div. 448) the presiding justice, delivering the opinion of this court, said: "The car having stopped and the passengers being called upon to alight, if, in the act of alighting, the plaintiff was thrown from the car by a jerk of the car, it was necessary for the appellant to prove that it was not responsible for the happening of that movement, in order to absolve itself from liability. It was not incumbent upon the plaintiff to say what caused the jerk. It was negligence upon the part of the appellant to allow the car to move while the passengers were in the act of alighting;" and it was that proposition, sustained by the unanimous decision of this court, that the learned trial judge stated to the jury, and in that, I think, there was no error.

The appellant also claims that the verdict was excessive; but considering the extent of the injuries, and the fact that the plaintiff was confined in the hospital from the twenty-sixth of July to the fourth of September, the fact that one leg is permanently shortened, with a stiff joint, we cannot say that the verdict was excessive.

I think the judgment and order appealed from should be affirmed, with costs.

VAN BRUNT, P. J., PATTERSON and HATCH, JJ., concurred; LAUGHLIN, J., dissented.

LAUGHLIN, J. (dissenting):

The action is brought to recover damages for personal injuries sustained by the plaintiff through the negligence of the defendant in suddenly starting one of its cars, on which the plaintiff was a passenger, while she was in the act of alighting therefrom, which precipitated her upon the ground inflicting bodily injuries. The learned trial justice drew the attention of the jury to the conflicting testimony as to the circumstances under which the accident happened, and properly instructed them that the plaintiff was bound to show by a preponderance of evidence that the accident was caused solely by the negligence of the defendant. There was evidence tending to show that after the car stopped on Vanderbilt avenue, adjacent to the Grand Central station, and while the plaintiff was in the act of alighting, the car started with a jerk, which threw her upon the ground, inflicting the injuries of which she complains; the jury might have found from the evidence that the start or jerk, if any, was slight; that the conductor did not signal the motorman to start, and that the motorman was not aware that she was attempting to alight at that point. The court also properly instructed the jury that the defendant was not liable unless the car was started by defendant's servants with a jerk while plaintiff was alighting and that this caused the accident, and also that if it was a mere accident there was no liability, as defendant was only liable for the negligence of its servants. At the close of the charge counsel for the plaintiff requested the court to charge the second request presented by the plaintiff. The court thereupon said: "That I have charged. I will modify what I have charged with respect to the second and third propositions to this extent: I do charge that if the jury find the car had stopped and that Mrs. Bente was preparing to alight and the car gave a start or jerk before she had a reasonable opportunity to alight, unless this start or jerk is satisfactorily explained by the defendant it was guilty of negligence, and it was not incumbent upon the plaintiff to prove what caused the start or jerk." This was duly excepted to by counsel for defendant. Neither the first, second nor third request referred to is printed in this record. This was the last instruction given to the jury. They would naturally infer from this language that the court intended to modify the instruction previously given

and to lay down as a rule of law that the mere starting of the car with a jerk, under the circumstances stated, was presumptively a negligent act as matter of law which would render the defendant liable regardless of the extent of the start or violence of the jerk. This, I think, was error. While the jury would have been justified in finding that this act constituted negligence on the part of the defendant, yet it was a question for the jury and should have been left to them as one of fact. (*Kellegher* v. *Forty-second St., etc., R. R. Co.*, 171 N. Y. 309.)

Judgment and order affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* LUIGI LAGROPPO, Appellant.

Evidence as to the corpus delicti *on a murder trial — assumption thereof by both parties on the trial — exclamation by a witness, indicating the impression made by an occurrence upon her mind — admission in evidence of a knife as the one used in committing the murder — charge as to guilt, where several persons act with a common purpose — a failure to submit one question and the submission of another to the jury in each case in the prisoner's favor — it is not a ground for reversal on his part — charge as to reasonable doubt.*

Upon the trial of an indictment for murder in the first degree it is incumbent upon the People to establish by direct evidence the *corpus delicti*, which is made up of two component parts, namely, death, as the result, and the criminal agency of another, as the means.

The first of these components must be established by direct proof, while the other may be established by circumstantial evidence.

Where, upon the trial, both the People and the accused assume that the person whom the defendant was charged with killing was the same person who was proved to be dead, the accused is not entitled to have a judgment of conviction reversed because of an alleged insufficiency of the People's proof upon this point.

While testimony given by a witness to the effect that at the time the crime was committed, she cried "there goes on murder here," is technically inadmissible as it is a characterization by the witness of the impression made upon her mind, the refusal of the court to strike out the statement does not require the reversal of a judgment of conviction where no exception was taken to the ruling and it is undisputed that murder was actually committed.

Evidence that immediately prior to the commission of the crime the defendant was chasing the deceased with a knife in his hand; that two days after the

occurrence a knife was found underneath a starch box on a fire escape of the house adjoining that occupied by the defendant; that such knife was the property of the defendant, and that this knife would produce wounds similar in character to those inflicted upon the deceased, is sufficient to warrant the introduction of the knife in evidence.

Where it appears that immediately prior to the stabbing of the deceased he was being pursued by the defendant and his two brothers, the court may properly charge: "If you are satisfied that the defendant and his codefendants, his two brothers, were acting with a common purpose, in concert one with the other, and that this purpose was to take the life of the deceased, then they are all equally guilty of the crime as charged, no matter who used the knife or inflicted the wounds."

The failure of the court to submit the question of the defendant's guilt to the jury, upon the theory that the wounds found upon the person of the deceased were inflicted by the defendant alone, although there was an abundance of evidence to sustain a conviction on that theory, does not operate to the prejudice of the defendant.

The fact that the court submitted to the jury the question whether the defendant, in what he did, acted in self-defense, although the evidence did not justify the submission of that question to the jury, affords no ground for the reversal of the defendant's conviction.

Where the court charges, "The People are obliged to make out their case beyond a reasonable doubt," and then reads the following from a decision in the Court of Appeals: "The defendant is entitled, as are all defendants in criminal cases, to have his guilt established to the satisfaction of a jury by competent evidence and beyond a reasonable doubt. A reasonable doubt is such a doubt as a man of reasonable intelligence can give some good reason for entertaining if he is called upon to do so," no error can be predicated thereon.

What charge is not susceptible of the construction that it limited the force and effect which the jury were authorized to attach to certain evidence bearing upon the original dispute which led up to the killing, considered.

APPEAL by the defendant, Luigi Lagroppo, from a judgment of the Court of General Sessions of the Peace in and for the city and county of New York in favor of the plaintiff, entered on the 20th day of February, 1903, convicting the defendant of murder in the second degree and sentencing him to imprisonment for life.

Charles G. F. Wahle, for the appellant.

Howard S. Gans, for the respondent.

HATCH, J.:

It is claimed on behalf of the People that on the 30th day of May, 1902, at about half-past five o'clock in the afternoon Antonio

Avocato came to his death from wounds inflicted upon his person by the defendant. While there is considerable contradiction in the testimony, yet upon all of the essential features of the case there is little conflict. It was made to appear upon the part of the People that a short time prior to the infliction of the wounds there had been a dispute between the deceased and Antonio Lagroppo, a brother of the defendant, over a game of ball, which the deceased and the three Lagroppo brothers, Luigi, Antonio and Domenico, had been playing in the yard in the rear of premises at 319 East One Hundred and Fifteenth street in the borough of Manhattan. In the course of the dispute Antonio felled the deceased with a blow in his face. The deceased arose and came out into One Hundred and Fifteenth street by passing through the hallway of No. 319. As he came out of the hall he was seen by several witnesses running down the street with the three Lagroppo brothers in pursuit, the defendant being first, with Domenico and Antonio second and third respectively. The deceased ran about 100 feet, when the defendant overtook him. What then occurred is the subject of considerable contradictory testimony. There is, however, no dispute but that at this place and at the hands of one, or all, of the three brothers, Avocato received the wounds from which he subsequently died. Some of the witnesses testified that when the defendant overtook Avocato, he seized him by the collar, stabbed him and then fell upon him; that the other two brothers fell or jumped on top of the men who were down. Other witnesses state that Avocato stumbled and fell; that the defendant threw himself upon him, was seen to strike him, and that Domenico came with a long stiletto and was seen to strike with that, after he had thrown himself upon the prostrate men. Within a few seconds after the fall the men arose from the street, and it was found that Avocato had received wounds from which he thereafter died. It was also found that the defendant had received two stab wounds, one in each arm near the shoulder. It is testified to by all of the witnesses that the pursuit of Avocato by the three brothers in the street took place. It was claimed, however, that Avocato was the aggressor and that he struck the defendant in the hallway with a knife, inflicting the wounds upon his arms; that he then ran and was pursued by the three brothers, and that the defendant was in the lead. Some of the witnesses testified that, when he was in

pursuit, the defendant had a knife in his hand; others that he had no knife, but that it was Domenico who had the knife and who did the stabbing; and the defense relied upon the latter statements to acquit the defendant, claiming that there was no proof which would warrant a finding that the wounds were inflicted by the defendant, but that whatever injury was done was done by Domenico. Shortly after the affray, officers found the defendant in a room occupied by him at 321 East One Hundred and Fifteenth street. He was partly undressed, and rags were tied around his wounds. When questioned as to the occurrence and how he got his injuries, he stated that he was trying to separate the combatants in a fight in which his brothers were engaged and that one of his brothers had stabbed him. A similar declaration was also testified to by a witness, who saw the defendant upon the street immediately after the affray. One of the police officers subsequently found a knife under a starch box upon the fire escape of the next house. It was produced upon the trial and was claimed by the People to have been identified as a knife belonging to the defendant, and that the wounds upon Avocato were of such a character as could have been inflicted with this knife. The two brothers Domenico and Antonio escaped and have never been arrested.

There is a distinct hiatus in the proof as to what became of Avocato immediately after the wounds were inflicted. Two witnesses testified that he got up from the street and went to a drug store at One Hundred and Fifteenth street and First avenue. Of what occurred in the drug store there is no proof. Where Avocato was thereafter taken does not appear. The next that is testified concerning him comes from Elmer B. Dixon, a police officer, who states that some time on the thirtieth day of May, the hour of which he does not give, he saw "the deceased; the dead man" when he was in the station house; that he found the ambulance at the door of the station house; that he jumped on behind with Officer Hollahan and they were driven up to 321 East One Hundred and Fifteenth street. Whether the body was in the police station or in the ambulance, or what was done with it, nowhere appears. The next information of the whereabouts of the body is that it was in the morgue at the foot of East Twenty-sixth street in the city and county of New York. How it got there is not disclosed. By reason of this failure to produce evi-

dence, counsel for the appellant is enabled to address this court in serious argument that the proof is insufficient in identification of the body found at the morgue with Antonio Avocato, who was stabbed in the affray. The argument is clearly justified from the state of the record in this respect. The defendant was indicted for the crime of murder in the first degree; it, therefore, became incumbent upon the People to establish by direct evidence the *corpus delicti*. It is made up of two component parts — death as the result and the criminal agency of another as the means. One of these component parts must be established by direct proof. One being established by such proof, the other can be made out by circumstantial evidence. (*Ruloff* v. *People*, 18 N. Y. 179; *People* v. *Bennett*, 49 id. 137.)

It appeared that wounds were inflicted upon Avocato at the time of the affray, yet it did not appear what the specific nature and character of those wounds were, or whether they were sufficient to produce death. All the proof upon that subject is that Avocato was stabbed in the body; that when the persons removed themselves from his body he rose to his feet and walked away, whether with or without assistance does not clearly appear. As to where or when he died there is not a syllable of proof. We do not find it necessary in view of the disposition which we make of the questions presented by this appeal to determine whether the direct testimony is sufficient to show that death resulted from the criminal act of the defendant committed at the time of the affray. There is some direct evidence to establish such fact. Upon this subject, however, we express no opinion.

The People to sustain this judgment rely upon the sufficiency of the proof to establish that the body found at the morgue was the dead body of Avocato, who was wounded in the affray The proof upon this subject is given by Joseph Trapani, an undertaker, who, it is claimed by the People, buried the body of Avocato. He testified that he had known Antonio Avocato three or four years before the 30th of May, 1902; that he saw him on the morning of that day; that he next received an order from his wife to bury the body; but could not remember whether he received the order on the first of June. Thereupon he went to the coroner and obtained a permit to remove the body, which he called that of Antonio Avo-

cato, to his home, 2131 First avenue. The body was removed by an agent of the undertaker, and he first saw it at the last-named place, and states that it was the body of Antonio Avocato, and that he was dead. At this place an autopsy was had upon the body, at which the undertaker was present; that after the thirtieth day of May he buried the body in Calvary cemetery, and that the person so buried he had known when alive for three or four years as Antonio Avocato. There was no cross-examination of this witness. Several of the witnesses, indeed nearly all of them, testified that they knew the man called Antonio Avocato; that he was the person who was in the yard playing ball with the defendant and his two brothers, and that he was the same person who was subsequently chased in the street by the defendant and his brothers and thrown down and stabbed. Salvatore Polizzi, a witness called by the defendant, and who witnessed the affray, testified: "I saw a man stabbed and I knew the next day that that man was dead." While this was a positive statement and connected the dead man with the affray, yet it is evident from the testimony that the witness only knew of the death from hearsay. Thomas Lingo, another witness for the defendant, testified that he knew Antonio Avocato in his lifetime by sight and had been informed who he was; he witnessed the affray, and in his testimony he used the term in connection with Avocato as being the "deceased." Being questioned in respect of such matter, he stated: "It means the man who is stabbed; a man who is stabbed is the deceased; that is the reason I describe Antonio Avocato as the deceased; not because he was sick; he wasn't sick; I understand that the deceased man means the man who died;" and again he says, in speaking of Avocato: "I knew this man had been killed; I had only seen him a few times before. I knew he had been killed in an affray with these three brothers — my friends — and I knew the police were investigating." Giovanni Selvaggio, a witness called by the defendant, testified: "The dead one struck at Luigi. When Luigi was just at the door of the store the dead man fronted Luigi and struck him. * * * Just as Luigi entered the hall the dead man struck him." And again, "I say I saw the deceased strike the defendant here, twice — strike the defendant in the hallway of 319 East One Hundred and Fifteenth street on the 30th day of May, 1902." He further states that he

was acquainted with Nelly Avocato, "the wife of the deceased." Charles Cefola, also a witness for the defendant, testified that he knew Antonio Avocato; he witnessed the affray, and, after describing it, states: "I knew a man had been killed on the street; I saw the killing," and the witness at several places in the testimony denominated Avocato as the "deceased." Antonio Margone, a witness called by the defendant, testified that he witnessed the affray, and states, "I always knew Avocato, the deceased. I knew him since the time when we had been born. Well, we were not exactly friends thoroughly, but we used to meet together anywhere."

In the course of the trial counsel for the defendant called attention to the lack of proof of the height of the parties, and among other things said, "the height of the deceased. There is no evidence in this case on that point." During the whole course of the trial, both by the People and by the defendant, it was assumed that Antonio Avocato, the person who received the wounds, was the same person, the body of whom the undertaker buried. It was not shown that there was any other person by that name, and the proof was direct that a man of that name received the wounds, was subsequently found dead and was buried. To the lack of proof we have already directed attention. The only failure is in the omission of a direct statement that the Antonio Avocato living and the Antonio Avocato dead was the same person. The proof was direct that such a person was at one time living and that he died, and the direct testimony of some of the witnesses is that it was the same Antonio Avocato, although it does not clearly appear that these witnesses were speaking from actual knowledge.

The court would have been authorized to accept a plea of guilty from the defendant of the degree of crime of which he was convicted by the jury. Had he pleaded guilty it would have been a confession on his part that the Antonio Avocato who was buried was the same person upon whom he inflicted the wounds. As it was competent for the defendant to have pleaded guilty to this crime, it was also competent for him upon the trial to admit that the person whom he was charged with killing was dead, and such admission, if made, would have dispensed with the necessity upon the part of the People of proving the same by other evidence.

When, therefore, both the People and the defendant assumed that the person who was stabbed was the same person who was dead and buried, this amounted to an admission of such fact by the defendant; and, as the proof offered directly tends to establish the same fact, we think it sufficient to show by direct and competent evidence the death of the person charged in the indictment to have been killed.

It was disclosed by the autopsy that the cause of death was hemorrhage of the lungs, due to penetrating stab wounds of the right lung; that these wounds passed in between the sixth or seventh and eighth ribs; that there was an incision of the lung, cutting the arteries, and that this came from knife thrusts. A knife was produced, claimed by the People to be the property of the defendant, and the physician who made the autopsy testified that the wounds might have been made with either blade of this knife.

We have, therefore, proof of the death of Avocato; that he came to his death through hemorrhage produced by knife thrusts; and it is uncontradicted that knife thrusts were delivered upon the body of the deceased by the defendant, or by his brother Domenico, or both of them. We have no hesitancy, therefore, in reaching the conclusion that the proof shows that the deceased came to his death at the hands of the defendant, or his brothers, acting in concert with him. This being the result of the evidence, it follows that the defendant was properly convicted of the crime of murder in the second degree, as all the elements which constitute that crime were present and developed by the evidence. If the death of Avocato be regarded as established, serious contention is not made against such conclusion. If, therefore, no errors were committed upon the trial to the substantial prejudice of the defendant, the judgment of conviction should be affirmed. It is claimed, however, that such errors were committed; one in the admission of evidence, and the other in the submission of the case by the learned court to the jury. As to rulings upon the evidence we only find it necessary to consider two questions, in which it is claimed that error was committed.

The first is found in the testimony of the witness Marie Rosso. She testified to the commencement of the dispute between the deceased and Antonio Lagroppo. When the four individuals had passed out through the hall, she went to the street from her apartment and observed the chase of the deceased. She was then asked:

"Q. What did you do then? A. Then I commenced to holler 'there goes on murder here.'" Motion was made to strike out this declaration. The motion was denied, the court ruling that it was part of the *res gestæ*. No exception was taken to the ruling. It may be that technically this evidence was not admissible, as it was a characterization by the witness of the impression made upon her mind, but it could not in view of the testimony be prejudicial to this defendant, because upon undisputed proof it was shown that murder did go on, and as what was done was practically undisputed, the mere exclamation of a witness at the time of the transaction can scarcely be said to have been prejudicial to the defendant.

A more serious question perhaps is that which relates to the introduction in evidence of the knife. It is claimed that it was not shown to have been the property of the defendant and was, therefore, highly prejudicial. Upon this subject the first witness called by the plaintiff testified that the defendant, when chasing the deceased, had a knife in his hand and that he saw the blade. The knife was then produced and exhibited to the witness and he stated that he had seen it before; that the defendant once had it out in his barber shop and he saw him sharpening a pencil with it. The witness did make a statement, "I never saw it in anybody's possession," but he preceded that statement by saying that he had seen it before, and followed it up by the statement of its use by the defendant in his barber shop. Marie Rosso also testified that she saw a knife in the hand of the defendant during the chase of the deceased. Anthony J. Berkowitz, a witness called by the defendant, testified that the defendant when chasing the deceased had a knife in his hand, and when the knife was produced he stated, "Well, I did not exactly see the handle, but the blade was a little bit — about as tall as that — a little bit taller; about six inches long, it was, where I seen it," and then he described the manner in which defendant used it upon the body of the deceased. Further testimony was given by the police officer Beller, who stated that two days after the occurrence the defendant's wife and another lady came to the station house and gave him some information. The information was sought to be elicited, but was excluded by the court. After this the witness testified that he went into the house next to that occupied by the defendant, and on the top floor, underneath a starch box on the

fire escape, he found the knife identified as the property of the defendant, and the further proof was that this knife could have inflicted the wounds which were found upon the deceased. When this officer informed the defendant that "the man that got cut in that game of cards is dead" (referring to deceased), the defendant said: "What was I going to do, let him kill me?"

No objection was interposed to any of this testimony, or to the introduction of the knife in evidence, and if it had been, it would have been unavailing. The knife was identified as the property of the defendant and the jury were authorized to find under the evidence that he had it open and in his hand when he was engaged in the pursuit of the deceased and that he used it upon him. This, coupled with the character of the wounds and the fact that this instrument would produce such wounds, was clearly sufficient to authorize the introduction in evidence of the knife. So far as there are any other questions raised upon the evidence we are unable to find that any of the rulings were erroneous to the prejudice of the defendant.

It is claimed, however, that the court committed error in the submission of the case to the jury. It is not contended but that the learned judge fairly submitted and defined the various degrees of the offense of which the jury were authorized to find the defendant guilty under the evidence. The court's instruction upon this point was quite comprehensive, both in statement of the offense, as defined in the several statutes, and also in the interpretation which has from time to time been placed upon these statutes by judicial decisions. The court did not in any enlarged sense submit to the jury as a question for them to find whether the defendant alone inflicted the wounds which caused the death; but upon this subject the court charged that if the deceased came to his death by knife wounds inflicted by one or the other, if done with intent to kill and with premeditation and deliberation, it constituted murder in the first degree, if the evidence satisfied the jury of such elements beyond a reasonable doubt. The court then charged: "If you are satisfied that the defendant and his codefendants, his two brothers, were acting with a common purpose, in concert one with the other, and that this purpose was to take the life of the deceased, then they are all equally guilty of the crime as charged, no matter who used the

knife or inflicted the wounds." Under the evidence this charge was undoubtedly correct and laid down a sound proposition of law. The court followed this statement of the law with a summary of the evidence, and upon this evidence the jury were authorized to find that the defendants were in pursuit of the deceased with the intent either to kill him or to inflict upon him grievous bodily harm, and that during the pursuit, and continuously up to the infliction of the wounds, the defendants were actuated by a common purpose to commit a felony. Under such circumstances the law is well settled that each and every one of the persons so engaged is a principal in the transaction and is responsible for the acts of the other. (Penal Code, § 29; *Ruloff* v. *People*, 45 N. Y. 213; *People* v. *Flanigan*, 174 id. 356; *People* v. *Sullivan*, 173 id. 122.)

The evidence would clearly have justified a submission of the question to the jury as to whether or not the wounds which were found upon the deceased were inflicted by the defendant alone. Had the court submitted the question upon such theory and had the jury convicted the defendant, there is an abundance of evidence to have sustained the conviction. The fact that the court did not submit this question, dissociated from the acts of the others, did not at all tend to the prejudice of the defendant. Logically such evidence would have justified a conviction of the defendant of murder in the first degree, and it may be that the inducing cause for the jury's finding a lesser degree of the crime for which the defendant was indicted was the fact that the court did not submit the question to the jury in this form. It does not, however, lie in the mouth of the defendant to make complaint of this fact, as its distinct tendency was to operate to his advantage; consequently in no sense can the defendant be said to be prejudiced by this omission. Besides, the court did state in one part of the charge: "You need only to direct your attention to the inquiry: was this killing felonious; was it lawful; was it done with intent, by this defendant alone, or acting in concert with others, for a common purpose; was it done with premeditation and deliberation?" It is evident, however, that the court was impressed with the view that the crime was committed by the three, acting in concert, and in the main the charge was submitted upon such theory.

It is further claimed that the court committed error in the follow-

ing statement: "It is not necessary for me to refer to the events preceding the flight. They have been most elaborately discussed by counsel, and the discrepancies between the witnesses on both sides have been dwelt on at considerable length. This, however, need not embarrass you in your deliberations, in view of the principles of law which I have read to you." Then follows the language first above quoted, and the court continues: "All the testimony that goes to what precedes is only important, I think, as concerning the motive actuating the parties." It is claimed that by this charge the court took from the jury the importance of the facts which had been given in evidence of the circumstances surrounding the original dispute between these parties. Such, however, is not the charge. It relates in its first part to the discussion of counsel in the submission of the case and their statement of the discrepancies; and the court said, and all it said, was that they need not be embarrassed in their deliberations by that, and then reiterated the questions which they were to determine, and finally stated that the testimony of the circumstances out of which originated the dispute were important as concerning the motive which actuated the parties, and this was all the importance such testimony had. No crime was committed at that time above that involved in an assault in the third degree, but it did bear directly upon subsequent features; and in accounting for them and the intent and motive which prompted the pursuit and the stabbing, such testimony was important and the court submitted it to the jury upon such theory. Thus the jury had laid before them such testimony for their consideration and its bearing upon the subject-matter at issue. The court in nowise limited the force and effect which the jury were authorized to attach to such evidence; and in view of all of the circumstances proved upon the trial, indeed not disputed, the assault in the yard became very much lessened in importance.

Complaint is further made that the court submitted to the jury the question as to whether the defendant in what he did was acting in self-defense, and the claim is that there was no theory developed upon the trial which authorized a submission of this question to the jury. We may admit the appellant's contention in this respect; but, surely, the defendant cannot complain because the court submitted a defense in his favor which the evidence did not justify. Under

the charge of the court the jury were authorized to find, and so finding acquit the defendant, that he was justified in doing what he did in order to protect himself from injury. The defendant's declaration was: "What was I going to do, let him kill me?" This, in connection with the stab wounds upon his arm, was probably the inducing cause which prompted the court to submit such question, and the defendant cannot complain because the court pointed out to the jury a way by which they might exonerate the defendant from the commission of the crime with which he was charged, even though the evidence did not justify it.

The appellant's further contention in this regard is that the court misled the jury by submitting such question, when it ought to have submitted the question as to whether the defendant and his brothers were in pursuit of the deceased for the purpose of apprehending him on account of the stab wounds which he had inflicted upon the defendant. It may well be answered in view of this contention that if the court was not justified in submitting the question of self-defense, it certainly was not justified from anything that appeared in the evidence in submitting the question as to whether the defendant was pursuing the deceased for the purpose of apprehending him and handing him over to justice. We have the undisputed facts of what was done, and therefrom it appears that there was the pursuit, the capture and the killing, and such facts did not warrant a submission to the jury of pursuit for the purpose of apprehending the deceased. What the defendant and his brothers concededly did effectually destroys such contention.

The charge respecting good character may be subject to some criticism (*People* v. *Childs*, 90 App. Div. 58); but no exception was taken thereto, and, as we are satisfied that the evidence was abundant in support of the verdict, we do not think it can be said that prejudicial error arose therefrom, as the jury were in fact authorized by the charge to consider evidence of good character as applied to the particular case.

The defendant also makes complaint of the charge of the court upon the subject of reasonable doubt. The court charged: "The People are obliged to make out their case beyond a reasonable doubt." And then the court read a decision of the Court of Appeals as to what constituted a reasonable doubt in this language:

"The defendant is entitled, as are all defendants in criminal cases, to have his guilt established to the satisfaction of a jury by competent evidence and beyond a reasonable doubt. A reasonable doubt is such a doubt as a man of reasonable intelligence can give some good reason for entertaining if he is called upon to do so." We are unable to find any defect in this definition, or in the burden placed upon the People with respect to the crime charged in the indictment. They were told in terms that the People were obliged to make out their case beyond a reasonable doubt. These are words of the broadest character. There was no limitation placed thereon respecting any essential feature constituting the offense which the People were not bound to maintain by affirmative proof, and this answered all requirements. In *People* v. *Cantor* (71 App. Div. 185) the construction which was placed upon the charge showed that the question of self-defense, which was urged in favor of the defendant, was not left to the jury in the form which the law required. Instead of charging the jury that the People were bound to establish beyond a reasonable doubt that the defendant therein was not justified in committing the homicide, the court placed such burden upon the defendant and left it for the jury to say whether he had justified his act, and the court held that in so submitting the case the jury were not left to determine whether the People had established to their satisfaction beyond a reasonable doubt that the defendant was guilty of the crime charged. As we have already observed, the present charge answered such requirement with respect to every feature which the case presented.

Upon the whole case we are satisfied that the evidence submitted was abundant to show the guilt of the defendant and that his conviction was justified thereby. Therefore, no injustice has been wrought upon him, and as there are no exceptions which present legal error and nothing which appears to show that any substantial right of the defendant has been prejudiced, we are required to render a judgment of affirmance. (Code Crim. Proc. § 542.)

It follows that the judgment of conviction should be affirmed.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and LAUGHLIN, JJ., concurred.

Judgment affirmed.

LOUIS ROTHSCHILD, Respondent, *v.* HENRY ALLEN and EDWARD L. NORTON, Appellants.

Relation between a stockbroker and a customer — extent of the formers' right to pledge the stock — when such a pledge is not a conversion — effect of a sale by the pledgee without notice to the customer — an assignment of the stock is an assignment of the cause of action for conversion — a failure to deposit further margin does not justify a sale without notice — proof of the conditions of the pledge by the broker.

The relation existing between a stockbroker and a customer for whom he has purchased stocks on margin is that of pledgor and pledgee, the legal title to the stock being in the customer.

The stockbroker may pledge the stock, and his pledgee will obtain a good lien therein, which he may enforce by a sale of the stock without notice to the customer and without incurring any liability to him or to the broker.

If the broker exercises his right to pledge the stock, he is bound at all times to keep himself in readiness to deliver the particular shares or an equivalent number of similar shares to the customer, whenever the latter offers to pay the unpaid portion of the purchase price of the stock.

If the pledge effected by the broker secures to the customer the right to obtain the stock from the pledgee upon payment of the balance of the purchase price, the pledge does not constitute a conversion of the stock by the broker, even though he neglects to keep on hand an equivalent number of shares of similar stock.

If, however, in such a case the broker's pledgee sells the stock without giving the customer notice of the time or place of the sale, or an opportunity to protect his interest by depositing more margin (to which he was entitled under the contract with the broker), and thereafter the broker refuses to comply with the customer's demand for delivery of the stock upon payment of the balance of the purchase price, the broker is guilty of a conversion.

An assignment by the customer of his right, title and interest in the stock converted vests in the assignee the right of action for the conversion of the stock, although it makes no mention of the right of action.

Where the contract between the customer and the broker provided that the stock should not be sold unless the customer should fail to deposit additional margin on notice, and that, if sold, the broker would give the customer notice of the time and place of the sale, the failure of the customer to deposit additional margins on notice does not relieve the broker from the necessity of giving notice of the time and place of the sale.

Semble, that, in an action brought against the broker for the conversion of the stock, the broker is entitled to show the arrangement under which he pledged the stock.

APPEAL by the defendants, Henry Allen and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in

the office of the clerk of the county of New York on the 22d day of April, 1903, upon the verdict of a jury for $3,000, and also from an order entered in said clerk's office on the 11th day of May, 1903, denying the defendants' motion for a new trial made upon the minutes.

John J. Crawford, for the appellants.

William J. Barr, for the respondent.

HATCH, J.:

This action is brought to recover damages for a claimed tortious act of the defendants in converting certain stocks, the property of plaintiff's assignor, Jacob M. Frank. It is averred in the complaint and admitted in the answer that the defendants were stockbrokers, and, as such, bought upon margin for Frank 200 shares of Anaconda Mining Company and 200 shares of American Smelting and Refining Company stock, upon which Frank had deposited $5,000 with the defendants to margin the same. There had been other transactions between the parties not material to be now considered. It was agreed by and between the defendants and Frank that the stock which had been purchased and which remained in the hands of the defendants should not be sold unless Frank's margin should be exhausted or become insufficient, and not then unless they should demand of him that he give increased security or take the stocks and pay the balance due therefor, and, if sold, that the defendants should give him due notice of the time and place of such sale and due opportunity to make good his margin. The defendants pledged the stocks purchased for Frank with the Bank of Montreal, the Bank of the City of New York and Talbot J. Taylor & Co., for loans to them. It does not appear from the evidence what the agreement of pledge of these stocks was, but upon the trial the defendants were asked what the arrangement was, objection was interposed thereto, the court excluded the same and plaintiff excepted. We think this ruling was error, as the defendants were entitled to show if such was the fact that the agreement of pledge was of such a character that Frank could at any time, upon paying the amount unpaid upon the purchase price of the stocks, obtain the same from the pledgee. In the disposition, however, which we make of this

appeal such error is unavailing, for we assume as a fact that the agreement of pledge protected Frank's right to the delivery of the stocks at any time when he should make payment of the purchase price, and this assumption secures to the defendants all possible benefit which they could derive had the entire agreement of pledge been given in evidence. On the 18th day of December, 1899, the defendants' firm suspended business, and on that day the pledgees of the stock sold the same and appropriated the money therefor to reimburse them for loans which they had made to the defendants. No notice of the time and place of the sale was given to Frank, nor was he given a reasonable opportunity to protect his interest by further margins, if such act upon his part would have availed to prevent a sale. Frank, having learned of the suspension, went to the office of the defendants, demanded his stocks and was informed that the firm had suspended business and that they could not make delivery of the same. On the fifth of January following he made another demand for their delivery. While there was some conflict in the evidence as to whether a demand was made by Frank of the defendants for the delivery of the stock, the evidence warranted the jury in finding that such demand was made. Under date of December 18, 1899, the defendants sent to Frank three letters, signed by the defendants "Per B," stating in each "We have sold for your account and risk," and then follows in each one respectively the name of the pledgees of the stock and the number of shares respectively sold of each. These notices reached Frank on the twentieth and twenty-first of December. Frank subsequently assigned the shares of stock to the plaintiff herein.

The legal rules which govern the respective rights of the parties in this transaction have been the subject of repeated adjudication, and the law bearing thereon is fairly well settled. The relation which is established between the broker and a customer, who buys stocks upon margin, is that of pledgor and pledgee. The legal title to the stocks is in the customer and the brokers are the pledgees of the same for the repayment of all advances made by them in connecnection with the transaction. (*Markham* v. *Jaudon*, 41 N. Y. 235; *Baker* v. *Drake*, 66 id. 518; *Gillett* v. *Whiting*, 120 id. 402.) Under such relation the broker has the right to pledge the stocks and obtain from the pledgee advances of money thereon, and the

latter by such transaction obtains a good lien thereon which he may enforce by a sale of the pledge without notice to the owner of the legal title, and without incurring any liability to him therefor, or to the broker making the pledge. The duty and obligation which the broker owes to his customer, however, is quite different. It was said by this court, in speaking of such obligation: "The plaintiffs might take title to the securities in their own name, and were not bound to retain or deliver the identical securities purchased for the defendant. Their duty was to keep on hand, or under their control, either the securities of the defendant or a like kind and amount of securities, and to have them in such situation that the defendant, by paying the amount due by him thereon, could, at any time, obtain them. This was what the plaintiffs agreed to do, and so long as they did this, the fact that they used the securities while in their possession, awaiting redemption by the defendant would not amount to a conversion thereof." And further: "Any disposition of the defendant's securities by the plaintiffs which would deprive him of his right to immediate possession thereof, upon payment or tender of the indebtedness by him to the plaintiffs on account of such securities, would amount to a conversion thereof. A sale or loan would do this, no securities of a like kind and amount being kept in their place, because the securities would be gone and could not be delivered to the defendant." (*Douglas* v. *Carpenter*, 17 App. Div. 329.) While, therefore, the defendants herein had authority to pledge the securities to secure loans to them, yet they were bound in making use of the securities to at all times during the life of the transaction keep themselves in readiness to deliver such securities or an equivalent number of the same kind of shares to Frank whenever he should offer to pay the unpaid portion of the purchase price. If the stocks were so pledged that delivery from the pledgee could be had when demanded by Frank upon payment by him of the unpaid purchase price, it would answer the obligation assumed by the broker, even though he did not have other shares of the same stock upon hand to deliver, as all Frank was entitled to was the delivery of the shares to which he was entitled upon payment, and if he could obtain them by payment conversion of the stock by the broker could not be predicated of the transaction. In the numerous cases which have arisen the sale of the stock which has been

held to be a conversion was usually by the affirmative act of the broker. In the present case the sale was not in fact made by the broker, but by the pledgee of the stock. It has been said that under such circumstances there was no conversion of the stock by the broker, as he was not guilty of conversion in pledging the stock, and took no affirmative steps resulting in its sale; that, therefore, his act constituted only a breach of the contract, which he had made, but did not constitute a conversion of the stock by him. We think this contention cannot be supported. The acts of the defendants herein placed the stock beyond their power to deliver the same when called upon so to do and they did not keep on hand an equivalent number of other shares to meet the demand. They could only make use of the stock by certainly guaranteeing their ability to procure and deliver when called upon by the owner so to do. When they pledged the stock to secure their own loans they did so at the peril of being able to deliver the same if delivery was demanded by the owner and he tendered payment. They were not authorized to pledge it, except upon that condition. It was their act which placed it beyond their power to deliver this stock or its equivalent when Frank made demand upon them so to do. When that demand was made they were without ability to perform, and as they had not complied with the conditions which alone gave them the right to pledge the stock, the resultant sale of the same became by operation of law their act and such act was as to them and between them and Frank a conversion of his property. In *Lawrence* v. *Maxwell* (53 N. Y. 19) the action was for conversion of certificates of stock, delivered by the customer to margin a gold transaction by a broker. The stocks were hypothecated by the broker with the knowledge of the customer. Thereafter the plaintiff tendered to the broker the amount secured by the delivery of the stock and demanded its return, and the broker refused, from inability to comply with the demand. Judge ALLEN, in delivering the opinion of the court upon this subject, said: "Conceding the right to use the stock pledged, by way of hypothecation, or otherwise, as claimed, and that it was at the time of the tender and demand lawfully out of the actual possession of the defendant, it was his duty at once to regain the possession and restore the same to the plaintiff. A neglect or refusal to do so gave to the plaintiff an action as

for a conversion of the property. (*Franklin* v. *Neate, supra.*)* It is immaterial whether the stock was hypothecated by the defendant upon a loan of money for the benefit of plaintiff's transactions or for his own purposes. In either case the duty and the obligation were the same. * * * If the pledgee may use the thing pledged he must do so at his peril, and so use it as not to affect the ultimate right and ability of the pledgor to have it again, when the lien shall be discharged." It may be further said that this question was not raised or in anywise presented upon the trial. Indeed the proof shows that plaintiff regarded the act of sale by the pledgees as their act, for in the notice which they gave the statement was "We have sold for your account and risk," and no claim was made that they were not chargeable with the legal results which flowed from that transaction, or but that it should be considered as their affirmative act, and as the question was not raised upon the trial it is not available to be considered upon this appeal. That the pledgees exercised a legal right when they sold the stock does not answer to relieve the defendants from their obligation to deliver the same when demand was made upon them for delivery. We are of opinion, therefore, that the failure to deliver the stock when demand was made upon them so to do operated as a conversion of the same and that, therefore, this action can be maintained.

It is said, however, that there was no assignment by Frank to the plaintiff of the cause of action arising out of the conversion. The assignment in form is of the right, title and interest of Frank in and to a specified number of shares of stock, which is the stock which was sold. No mention therein is made of an assignment of the cause of action, and it is claimed, therefore, that the cause of action did not pass. Such point was raised, as the defendant moved to dismiss upon that ground. It was said by Judge ALLEN in *Sherman* v. *Elder* (24 N. Y. 381): "An assignment of the property by name after the conversion, carries the right of action for the conversion, *ut res magis valeat quam pereat.* Courts will give effect to a transaction if possible, and so construe an instrument as to give effect to the intent of the parties." (*Fitch* v. *Rathbun*, 61 N. Y. 579.)

* 13 M. & W. 481.

The court correctly charged the jury that even though there was failure after notice to put up the margin, it would not excuse the giving of reasonable notice of the time and place of the sale. There is no evidence in the case which would justify a finding that any notice was given of the time and place of sale. The defendants did not pretend that they gave any notice, nor does the evidence show that a reasonable opportunity was given to deposit further margins. On the contrary, the evidence is satisfactory to show that no such opportunity was given, and testimony which tends otherwise is not sufficient to discredit it. The court submitted to the jury the proper rule of damage, and the amount af the verdict finds support in the evidence.

These views lead us to the conclusion that the judgment and order should be affirmed, with costs.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and LAUGHLIN, JJ., concurred.

Judgment and order affirmed. with costs.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* LAWRENCE H. ST. CLAIR, Appellant.

Annoyance to a person in a public place — when the action of a licensed private detective in following a person is a misdemeanor under section 675 of the Penal Code — what proof is necessary to establish the offense — "in any place" held to mean in a public place.

A licensed private detective, who follows another for the mere purpose of ascertaining and reporting where he goes and what he does, dogs his steps about the public streets and places, keeps him constantly in sight, following him into buildings or waiting outside thereof until he comes out, and who does this in such a manner that the person followed observes that he is being followed, and who persists in his espionage after becoming aware that it has been discovered, is, in the absence of legal justification for his conduct, guilty of violating chapter 675 of the Penal Code, which provides: "Any person who shall by any offensive or disorderly act or language, annoy or interfere with any person or persons in any place, or with the passengers of any public stage, railroad car, ferry boat, or other public conveyance, or who shall disturb or offend the occupants of such stage, car, boat or conveyance, by any disorderly act, language or display, although such act, conduct or display may not amount to an assault or battery, shall be deemed guilty of a misdemeanor."

Such conduct on the part of the detective is not justified, whether his purpose is to serve a civil process or private notice or paper, or to report the character, habits or associations of the person under surveillance, or to obtain evidence to be used in a civil action or proceeding.

The words "in any place," used in this section, mean any public place, and the public conveyances mentioned in the statute were not specified with intent to limit the application of the words "in any place," but with intent to remove any question as to whether such conveyances were public places.

In order to establish the offense mentioned in the section there must be an annoyance to or interference with some person in a public place by act or language which is either offensive or disorderly.

McLaughlin, J., dissented.

APPEAL by the defendant, Lawrence H. St. Clair, from a judgment of the Court of Special Sessions of the first division of the city of New York in favor of the plaintiff, entered on the 1st day of June, 1903, convicting the defendant of a violation of section 675 of the Penal Code.

James W. Osborne, for the appellent.

Howard S. Gans, for the respondent.

LAUGHLIN, J.:

The complainant, Frederick A. La Roche, was a manufacturer of electrical apparatus and his place of business was at the corner of Thirteenth and Hudson streets in the city of New York. He acted as general sales agent and superintendent of the business. On the 3d day of April, 1903, the defendant was in the employ of Meechan's Detective Agency. On that day he was arrested by a police officer for following the complainant from place to place along the public streets and making inquiries concerning him and annoying and interfering with him, and was tried on that charge. The People gave evidence tending to show that defendant had been following the complainant for four days; that he would station himself on the street corner opposite the complainant's office in the morning and remain there keeping an outlook toward the office or toward complainant when on the walk, in front of the office, where he frequently transacted business; that when complainant came upon the street defendant would follow, in plain sight, wherever he went; that whenever complainant went into a restaurant for luncheon defendant would follow him in, sit at a table near by and leave when

complainant did and resume his pursuit; that on the day of the arrest complainant departed from his principal place of business in an automobile to visit a branch office on Thirty-eighth street and the defendant followed on a bicycle, riding at his upmost speed to keep nearly up, and then when complainant entered his branch office the defendant watched for his return and again in like manner followed the automobile back to the place from which it started and on seeing complainant re-enter his place of business dismounted and remained on the street corner looking over as before; that the complainant observed that the defendant was watching and following him and saw defendant point him out to several people and overheard him remark to them "That is him now" at a time when complainant was endeavoring to transact business on the walk in front of his place of business; that this conduct on the part of the defendant disturbed the complainant's peace of mind and interfered with his ability to transact business; that at times the defendant, when evidently in doubt concerning the complainant's movements, made inquiries of complainant's employees and others and on these occasions would be observed pointing over toward complainant's place of business. The defendant did not attempt to speak to the complainant or obstruct his passage upon the public streets or elsewhere, but he kept within from 10 to 200 feet and usually nearer than 100 feet and remained in plain sight. The defendant testified in his own behalf. He denied that he had followed the complainant prior to the day of the arrest or that he made inquiries concerning him of any one except the janitor of the building and one of complainant's employees. He assigned no reason for following the complainant except that he was instructed by the detective agency to go around to complainant's place of business and "look and see" what he was doing. According to the evidence presented in behalf of the People, however, the defendant had been following the complainant for several days and in a manner that rendered it perfectly obvious to the latter. The complainant at every turn was confronted with the presence of the defendant in the immediate vicinity and the inference is fairly justified that defendant became aware that the complainant had discovered his espionage and thereafter continued his surveillance as before.

By chapter 327 of the Laws of 1891 section 675 of the Penal Code as originally enacted (Laws of 1881, chap. 676), and amended in 1882 (Laws of 1882, chap. 384), was amended by adding thereto the following: "Any person who shall by any offensive or disorderly act or language, annoy or interfere with any person or persons in any place, or with the passengers of any public stage, railroad car, ferry boat, or other public conveyance, or who shall disturb or offend the occupants of such stage, car, boat or conveyance, by any disorderly act, language or display, although such act, conduct or display may not amount to an assault or battery, shall be deemed guilty of a misdemeanor." The charge upon which the defendant has been tried and convicted is for a violation of the provision of the section added by the amendment of 1891.

The appellant contends in the first place that the words "in any place" are qualified by the subsequent provisions of the statute, and that it was only designed to prohibit and punish acts committed in public stages, railroad cars, ferry boats or other public conveyances, or *similar places*. We are unable to agree with this construction. The words "in any place" undoubtedly have reference to a *public* place; and public stages, railroad cars, ferry boats and other public conveyances were doubtless specified to remove any question as to whether they were public places and included in the words "in any place" preceding them in the statute. It does not appear whether the detective agency by which defendant was employed was licensed; but since it is unlawful to engage in the business of a private detective for hire or reward without a license (Laws of 1898, chap. 422, §§ 1, 5, as amd. by Laws of 1901, chap. 362 and Laws of 1899, chap. 318 respectively) it should, perhaps, be presumed that the firm was duly licensed. It is contended at the outset by counsel for appellant that licensed private detectives are not subject to the operation of section 675 of the Penal Code, even if otherwise it should be applicable to them. It is manifest that the primary object of licensing private detectives upon good character being satisfactorily shown, and requiring them to give a substantial bond, is the protection of persons requiring such service and affording them redress in case of misconduct. The language of the statute (Laws of 1898, chap. 422, § 2, as amd. by Laws of 1901, chap. 362) indicates that it was con-

templated that such licensed detectives or detective agencies might engage in the business of "furnishing or supplying information as to the personal character of any person or firm, or as to the character or kind of the business and occupation of any person, firm or corporation." But this does not indicate a legislative intent to license or permit such detectives or their employees, who do not require a license (Laws of 1898, chap. 422, § 4), to *annoy* or *interfere* with citizens or others. Moreover, the provisions of the Penal Code now under consideration were enacted before the enactment of the first statute providing for licensing private detectives, and if the Legislature intended to exempt them from the operation thereof it would have so provided. As we view it, the Legislature intended to prohibit one person from, *by any offensive or disorderly act or language, annoying or interfering with another in a public place.* Two things must occur to constitute the crime. One of these relates to the conduct of the accused, and the other to the effect of such conduct upon the complainant. There must be an annoyance to or interference with some person in a public place by act or language which is either offensive or disorderly. It is clear that if one person, without lawful excuse, persists in talking to or walking with another, with whom he is not acquainted, this may be offensive or disorderly and it may constitute an interference with or annoyance to the person accosted within the prohibition of the statute. Such are doubtless the cases that commonly arise under the statute; but the scope of the statute is broad and necessarily so. There can be no doubt that it was within the constitutional province of the Legislature to declare such conduct as is prohibited a misdemeanor, even though there be no right of privacy at common law, as is claimed to be the effect of the decision in *Roberson* v. *Rochester Folding Box Co.* (171 N. Y. 538), yet it does not follow that the Legislature is powerless to prohibit conduct such as it has here declared to be a misdemeanor. The Legislature foresaw that it would be impossible to specifically enumerate the various acts that would constitute the offense. Consequently, whether in a particular case the statute has been violated depends upon the nature of the conduct of the defendant and its effect upon the complainant. Of course the statute does not prohibit the officers of the law from the full performance of their duties in detecting and punishing crime, nor does it prohibit them or private

detectives or others from executing or serving any lawful process, notice or other paper or from making any lawful inquiries or investigation concerning the conduct of any individual, firm or corporation. But when one person, even though he be a licensed private detective or an employee of one so licensed, for purposes of his own or upon employment for hire, persists in following another for the mere purpose of ascertaining and reporting where he goes and what he does and dogs his steps about the public streets and places, keeping him constantly in sight, or if he enters a building, following him in or waiting outside until he reappears, *and does this in such a manner that the person followed* while being followed observes it, and after this becomes evident to the defendant he still persists in his surveillance, it may fairly be inferred from these facts that the person followed has been annoyed, and, in the absence of legal justification, that the person following him has committed an offensive or disorderly act causing such annoyance within the letter and the fair intent and meaning of this statute. It cannot, of course, be authoritatively decided upon the record now before us, which discloses no attempt to justify except the mere fact of employment by a private detective agency, what facts would constitute a justification in all cases. If the purpose were to execute or serve a civil process, or to serve a private notice or paper, that could scarcely justify such surveillance, for the service should be made as soon as the identity of the party is discovered and a reasonable opportunity afforded therefor. If the purpose were to report on one's character, habits or association or to obtain evidence to be used in a civil action or proceeding, a suspicion as to what might be discovered by such espionage would be no justification for conduct annoying an individual in a manner that might lead to a breach of the peace. If a man may be followed thus openly, so may any woman or girl, and her character might be thereby seriously affected without redress civilly or criminally. Skillful private detectives should be able to perform any lawful services for which they may be employed without following a person in this open manner and necessarily annoying him; and if they cannot, they must, when they become aware that their espionage is discovered, desist or run the risk of a criminal prosecution.

We are, therefore, of opinion that the facts justified the con-

viction of the defendant of a violation of section 675 of the Penal Code and that the judgment should be affirmed.

VAN BRUNT, P. J., PATTERSON and O'BRIEN, JJ., concurred; MCLAUGHLIN, J., dissented.

MCLAUGHLIN, J. (dissenting):

The rule of law to be applied to the facts in this case is the one which, in my opinion, should be applied in *People* v. *Weiler* (89 App. Div. 611), argued on the same day. Here, it is true, it does not appear, as in the *Weiler* case, that the defendant was shadowing the complainant for the purpose of locating him, to the end that a subpœna to appear in a criminal proceeding might be served, and it is equally true that it does here appear that on one or more occasions the defendant pointed out the complainant and said, "That is him now," but such statement was made, so far as appears, in a quiet and orderly manner. It did not, nor did the other acts of the defendant, in my opinion, constitute within the meaning of the statute disorderly or offensive acts, nor make the defendant guilty of a crime simply because the complainant was annoyed.

The reasons assigned by me for the reversal of the judgment in the *Weiler* case are equally applicable to the question here presented, and for such reasons I vote for a reversal of the judgment.

Judgment affirmed.

THE BARBER ASPHALT PAVING COMPANY, Appellant, *v.* WILLIAM R. WILLCOX and Others, as Commissioners of Parks of the City of New York, and THE CITY OF NEW YORK, Respondents.

Specifications for bids in New York city — what specifications do not authorize the acceptance of a proposal for a patented pavement.

The officials of the city of New York prepared specifications for the paving of a street, which provided as follows:

"The bidder may, at his option, offer to lay the roadway pavement in one or other of the following three methods separately described and designated herein, as indicated:

"Method A. Pavement of asphalt blocks three inches in thickness, with a base of Portland cement concrete and mortar three inches in thickness.

"Method B. Pavement of sheet asphalt two inches in thickness, with a bituminous concrete binder one inch and a Portland cement concrete base three inches in thickness.

"Method C. The Warren Patent Bitulithic Pavement two inches in thickness, with a base of bituminous concrete four inches in thickness."

"Method C" related exclusively to a patented pavement which the patentees had the exclusive right to lay.

Held, that the city officials were prohibited from accepting the proposal for the patented pavement by section 1554 of the revised city charter, which provides, "Except for repairs, no patented pavement shall be laid and no patented article shall be advertised for, contracted for or purchased, except under such circumstances that there can be a fair and reasonable opportunity for competition, the conditions to secure which shall be prescribed by the board of estimate and apportionment," for the reason that a fair and reasonable opportunity for competition was not afforded with respect to the patented pavement.

That the three kinds of pavement were materially different and afforded no standard of comparison between them by which it could be determined which was offered at the lowest price.

Semble, that in order to comply with the provisions of the charter with respect to patented pavements, specifications should be drawn prescribing, in general terms, the character of the pavement and the nature of the material to be used, so that persons in a position to lay patented or unpatented pavements conforming to such general specifications, might compete therefor. The right to accept a bid for a patented pavement depends, in the first instance, on its being the lowest, and, if not, on its being, in the judgment of the board of estimate and apportionment, manifested by a three-fourths vote, for the interest of the city.

McLAUGHLIN, J., dissented.

APPEAL by the plaintiff, The Barber Asphalt Paving Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 13th day of November, 1903, denying the plaintiff's motion to continue a temporary injunction *pendente lite*.

L. Laflin Kellogg, for the appellant.

Chase Mellen, for the respondents.

LAUGHLIN, J.:

This is a taxpayer's action to enjoin an alleged illegal award of a contract for furnishing and setting new curbstones and paving with a patented pavement known as "Warren Brothers Bituminous Macadam Waterproof Pavement" the carriageway of Seventy-second street, between Central Park West and Riverside Park in the

borough of Manhattan, New York. The defendants have prepared plans and specifications for this work, and have advertised for proposals therefor. The specifications provide, among other things, that "The bidder may, at his option, offer to lay the roadway pavement in one or other of the following three methods separately described and designated herein, as indicated:

"Method A. Pavement of asphalt blocks three inches in thickness, with a base of Portland cement concrete and mortar three inches in thickness.

"Method B. Pavement of sheet asphalt two inches in thickness, with a bituminous concrete binder one inch and a Portland cement concrete base three inches in thickness.

"Method C. The Warren Patent Bitulithic Pavement two inches in thickness, with a base of bituminous concrete four inches in thickness."

It is conceded that said "Method C" relates exclusively to a patented pavement which the Warren Brothers have the exclusive right to lay, and that with respect thereto no one can compete with them or their licensees. The plaintiff alleges, and it is not denied, that the defendants intend to accept the proposal for the patented pavement and to award the contract accordingly. The plaintiff contends that such an award of the contract will be in violation of the provisions of section 1554 of the revised charter (Laws of 1901, chap. 466), which provides as follows:

"Except for repairs, no patented pavement shall be laid and no patented article shall be advertised for, contracted for or purchased, except under such circumstances that there can be a fair and reasonable opportunity for competition, the conditions to secure which shall be prescribed by the board of estimate and apportionment."

The defendants on the other hand claim that the board of estimate and apportionment has prescribed conditions affording a fair and reasonable opportunity for competition and that these conditions are embodied in the specifications. The conditions prescribed which it is claimed admit of such competition are the three methods, A, B, C, already quoted, together with particular specifications with reference to the pavement to be laid under each of the methods respectively. It is further contended on the part of the respondents that these conditions conform to the views expressed by this

court in the case of *Rose* v. *Low* (85 App. Div. 461) which was an action to enjoin the award of a contract for paving a portion of Seventh avenue with this patented pavement at a time when the specifications described the patented pavement only. After our decision on that appeal adjudging the proposed action to be illegal and in violation of said section 1554 of the revised charter, the specifications in question were prepared evidently with the idea that by adopting them and inviting proposals thereunder the defendants might legally accomplish this purpose of awarding the contract for the patented pavement. I think the respondents are in error in respect to their claim that our opinion in the *Rose* case is authority for awarding a contract for the patented pavement under these specifications. It is clear that the Legislature contemplated that a patented pavement might be used notwithstanding the fact that no one but the patentee or his licensee could lay the same; but it is equally clear that it has prohibited the award of a contract for such pavement unless the proposals are invited under circumstances which afford a fair and reasonable opportunity for competition. It is manifest that the competition could not be with reference to the particular patented pavement for the patentee has the exclusive right to lay that. What the Legislature intended, I think, is that the proposal by the owner or licensee of the patent should be submitted in competition with others on the same specifications. Here three different kinds of pavement are specified with different specifications for each, and one of them relates solely to the patented pavement and is not open to competition. Aside from one being patented and the others not, it is evident that the three kinds of pavements upon which bidders have the option of submitting proposals are materially different. "Method A" calls for an asphalt block pavement, the blocks to be *three* inches in thickness with a base of Portland cement, concrete and mortar *three* inches in thickness. "Method B" relates to a pavement of sheet asphalt only *two* inches in thickness with a concrete binder *one* inch and a Portland cement concrete base *three* inches in thickness; and "Method C" provides for a surface of bitulithic pavement *two* inches in thickness with a base of bituminous concrete *four* inches in thickness. As I view these provisions of the revised charter, so far as they relate to patented pavements, they contemplate that the specifications may provide in general terms

for a smooth sheet pavement with a base of a certain thickness, prescribing in general terms the material to be used, and with a binder over the base of a certain thickness, prescribing in general terms the nature of the material to be used, and with a surface of a certain thickness, prescribing in general terms the nature of the material to be used — the general description of the nature of the material to be such that the whole may be open to competition. Then bidders might be allowed to present proposals specifying the price per square foot or yard for which they will lay the pavement according to their special processes or formulas whether patented or not, but which must conform to the general specifications. If any proposal should be for a patented pavement the right to accept it would depend in the first instance on whether it was the lowest and, if not, whether in the judgment of the board of estimate and apportionment manifested by a three-fourths vote it would be for the interest and advantage of the city to accept it notwithstanding. (Revised Greater N. Y. Charter, § 419.) Thus we would have the competition required by the revised charter.

The provisions of the revised charter prescribing the definiteness with which plans and specifications for public work shall be prepared have not been drawn to our attention nor have I examined them, but I assume from the provisions of section 1554 that they do not require the preparation of plans and specifications with such definiteness and precision as to prevent competition for a patented pavement. If not, then I see no reason why specifications of a general nature may not be prepared along the lines I have indicated or on similar lines, leaving each bidder to present his particular process or formula for preparing and laying the different parts of the pavement, or to file his particular specifications, that will conform to the general specifications prescribed by the city authorities, and in his proposal refer to those thus filed by him. This is the view I entertained when I examined the question on the appeal in the *Rose* case and it is the view I understand to be expressed in the opinion rendered on that appeal. The specifications in question do not conform to these views. The different parts of the different pavement called for differences in thickness and in the nature of the material, aside from the question of patents, and, for these reasons, there would be no standard of comparison between the different proposals,

for determining which, in reality, would be the lowest, for they do not involve the same quantity of the different kinds of material nor would they involve the same amount of labor. The city may protect itself concerning the durability and practicability of the pavement by requiring a sufficient bond and a long-term guaranty. With these provisions and requirements the officials representing the taxpayers will be able readily to determine what action the interests of the taxpayers require, and they will be much more likely to obtain the performance of the work at a reasonable price, which is the object of competition, than under specifications such as those presented by this record.

For these reasons I am of opinion that the order should be reversed, with ten dollars costs and disbursements, and motion for injunction granted, with ten dollars costs.

VAN BRUNT, P. J., and PATTERSON, J., concurred; O'BRIEN, J., concurred in result; McLAUGHLIN, J., dissented.

McLAUGHLIN, J. (dissenting):

I dissent upon the ground that the question has been decided otherwise by this court. (*Rose* v. *Low*, 85 App. Div. 461.)

Order reversed, with ten dollars costs and disbursements, and motion for injunction granted, with ten dollars costs.

Cases

DETERMINED IN THE

FOURTH DEPARTMENT

IN THE

APPELLATE DIVISION,

January, 1904.

ROBERT F. LIVINGSTON, as Receiver of All the Debts, Property, etc., of ARNOLD L. EATON, Respondent, *v.* FRED W. EATON and Others, Appellants, Impleaded with CHARLES GROSS and Others, Defendants.

Evidence of a gift by a judgment debtor of a mortgage sought to be foreclosed by a receiver of his property, where the answer does not allege such gift — it makes competent proof that the gift was fraudulent and void, although that fact was not alleged in the complaint — objection that the receiver's bond was not properly executed — it is not available to a third person — what omission in the bond is merely an irregularity.

The objection that the bond given by a receiver, appointed in proceedings supplementary to execution, was not executed in the form required by the statute, is not available to defeat an action brought by the receiver to collect a debt due from a third person to the judgment debtor.

In such a case the remedy of the third person is by a motion to require the bond to be made to comply with the provisions of the statute.

The omission from the bond of a certificate, to the effect that the person who took the acknowledgment of the surety upon the bond was a notary public is a mere irregularity and such bond may properly be received in evidence.

In an action brought by a receiver appointed in supplementary proceedings to foreclose a mortgage executed to the judgment debtor, the answer of the defendants denied that the plaintiff was the owner of the mortgage and alleged that the amount, if any, due thereon, had been paid prior to the plaintiff's appointment.

Upon the trial the defendants were permitted to give evidence tending to establish a gift of the mortgage by the judgment debtor to the mortgagor, although such gift was not alleged in the answer.

Held, that the plaintiff was properly allowed to show that the alleged gift was fraudulent, void and of no effect, although the complaint did not allege the fraudulent character of the gift;

That the defendants' allegation of payment was in no sense equivalent to an allegation of a gift of the mortgage.

APPEAL by the defendants, Fred W. Eaton and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Herkimer on the 1st day of July, 1902, upon the report of a referee.

The action was commenced in December, 1889, by the plaintiff, as receiver of the property of Arnold L. Eaton, appointed on the 6th day of October, 1899, in proceedings supplementary to execution, to foreclose a mortgage for $2,000 upon certain premises situate in the city of Little Falls, in the county of Herkimer, N. Y., which was made by the defendant Fred W. Eaton, the son of said Arnold L. Eaton, and which was executed and delivered to said Arnold L. Eaton as part of the consideration of premises sold by him to his son.

The appellants, by their briefs, raise two points, upon which it is urged that the judgment should be reversed. The first point is that the trial court committed reversible error in receiving, against defendant's objection, the bond of the plaintiff, as receiver, because, as is claimed, "there was no proof of its execution by the Surety; and that there was no proof of the official character or authority of the Notary Public who purported to have taken the acknowledgment of the execution by the Surety; and that there was no proof that he was a Notary Public." The second point is that the court committed error in permitting the plaintiff to introduce evidence tending to rebut the proof made by the defendant, to the effect that the mortgage in suit was transferred by gift from Arnold L. Eaton to the defendant Fred W. Eaton about Christmas time, 1896, and before the appointment of the plaintiff as receiver, which evidence, offered by the plaintiff and received by the court, tended to show that such alleged gift was fraudulent and void. There was no allegation of such gift in the complaint or answer, and no allegation in the complaint of its fraudulent character.

Eugene E. Sheldon, for the appellants Fred W. Eaton and Jessie S. Eaton.

Myron G. Bronner, for the appellant Arnold L. Eaton.

C. J. Palmer, for the respondent.

McLENNAN, P. J.:

It appears that on the 27th day of February, 1896, Arnold L. Eaton was the owner of a parcel of land in Little Falls, called in the record the icehouse property, and that on that day he conveyed the same to the defendant Fred W. Eaton, and as a consideration for such conveyance the defendant Fred W. Eaton, among other obligations, assumed to execute the mortgage in question to Arnold L. Eaton. Arnold L. Eaton became financially embarrassed, and in proceedings supplementary to execution on the 6th day of October, 1899, the plaintiff was appointed receiver of his property by an order made by the county judge of Herkimer county. Such order contained the usual provisions, and also provided that before entering upon the discharge of his duties as such receiver he should execute a bond in the penalty of $500 for the faithful discharge of his duties. Such bond was executed. It was presented to the county judge and was approved by him. The bond so approved does not contain a certificate to the effect that the officer or notary public who took the acknowledgment of the surety upon such bond was a notary public. We think such omission was simply an irregularity, and is not available to the appellant upon this appeal (*Wright* v. *Nostrand*, 94 N. Y. 31, 45); and that, notwithstanding the failure to obtain such certificate, the bond was properly received in evidence. But independent of the question as to whether or not the bond was properly executed, we think the right of the receiver to maintain the action must be sustained in this proceeding, even if the execution of the bond was defective; that the validity of the bond or its execution cannot be raised collaterally in defense of an action of this kind. The plaintiff was appointed receiver of the property of the judgment debtor, Arnold L. Eaton, in proceedings supplementary to execution, and was charged with the duty of collecting and applying in payment upon the debts of such judgment debtor any property of which he was seized or possessed at the time of such appointment. We think it is not available to a creditor of such debtor to assert, in answer to a claim sought to be enforced by the receiver, that such receiver has not given a bond

in the form required by the statute (See Code Civ. Proc. § 715), but that the remedy of such debtor is by motion to require such bond, if defective, to be made to comply with the provisions of the statute.

In the case at bar the plaintiff was duly appointed receiver of the property of Arnold L. Eaton. He took possession of such property and entered upon the discharge of his duties as such receiver, and attempted to enforce the obligations in favor of the estate which he, under the law, was charged with the duty of protecting. The court having jurisdiction to appoint such receiver, we think the objection that there was some informality in the execution of the bond required to be given by such receiver is not available to a creditor in an action of this character. We, therefore, conclude that the first point raised by the appellants should not be regarded as sufficient to require a reversal of the judgment appealed from.

As to the second point raised by the appellants: The plaintiff alleged a perfect cause of action in his complaint, and made proof before resting of such facts as entitled him to the relief demanded. The defendants by their answer, so far as it is important to note denied that the plaintiff was the owner of the mortgage set forth in the complaint, and alleged that the amount, if any, due upon such obligation, had been fully paid and discharged before the appointment of the plaintiff as receiver, and before the commencement of this action. It was not suggested in the answer of either appellant that the mortgage in suit was surrendered or transferred as a gift to the defendant Fred W. Eaton by his father Arnold L. Eaton, the mortgagee therein named, before the appointment of the receiver or before the commencement of the action, but notwithstanding the failure to allege such gift the defendants were permitted, by cross-examination of plaintiff's witness, Arnold L. Eaton, to give evidence tending to establish such gift. Thereupon the plaintiff was permitted to show that the alleged gift of such mortgage to Fred W. Eaton was void, fraudulent and of no effect. We think such evidence was entirely competent, and that its reception was in no manner prohibited by the fact that the plaintiff had not alleged the fraudulent character of such gift, when the plaintiff by his complaint was, in effect, maintaining that no such gift had been made, and when, by the answer of the appellant,

no such gift was alleged. The defendants' allegation of payment was in no sense equivalent to an allegation of gift of the obligation upon which recovery was sought.

The trial court found that on the 23d day of January, 1899, the time when the order in proceedings supplementary to execution was granted, and on the 6th day of October, 1899, the time when the plaintiff was appointed receiver of the property of Arnold L. Eaton, the said Arnold L. Eaton was the owner of the mortgage described in the complaint and sought to be foreclosed in this action, and that such mortgage at such time was in the actual possession of said Eaton. We think the evidence fully supports such finding, and that no error was committed by the trial court in the reception of the evidence objected to by the appellant, and which is urged as a ground for the reversal of the judgment appealed from.

It follows that the judgment should be affirmed, with costs.

All concurred.

Judgment affirmed, with costs.

Willis B. Horton, Appellant, v. Erie Preserving Company, Respondent.

Estoppel — acquiescence in the continuance of the execution of a contract, without objection — time, not of the essence of a contract — counterclaim — representations of an agent, made without authority or the knowledge of his principal.

November 21, 1899, an association of business men in Irving, Chautauqua county, N. Y., entered into an agreement with a preserving company, which provided that a committee of such association would procure a conveyance to the preserving company of certain land in the Seneca Reservation and would, on or about January 1, 1900, procure the passage of an act of Congress approving the conveyance, such an act being necessary to perfect the title.

The committee also agreed to secure from the residents and farmers of Erie and Chautauqua counties on or before February 1, 1900, subscriptions amounting to at least $10,000 to be paid to the preserving company in fruits, produce, labor, team work, or cash, within a period of three years from the time the preserving company should commence the operation of a canning factory on the lands in question, The preserving company, on its part, agreed to locate a canning plant on the lands and to begin canning operations thereat during the season of 1900.

The committee procured $7,000 in subscriptions, which was regarded by the preserving company as a compliance by the committee with the obligations imposed upon it. The subscription agreement obligated the signers to pay the sum of $100 in produce during the years of 1900, 1901 and 1902 "for the purpose of inducing said Erie Preserving Company to locate their new canning factory at Irving, New York." It also recited that the preserving company was willing to locate its plant at Irving, "provided a certain suitable site can be secured, and a reasonable subscription signed by the produce growers, workers and others who will be directly benefited by the location of their plant and business at Irving."

Immediately after the execution of the contracts, the committee of the business men's association procured a conveyance of the lands in question and the introduction in Congress of a bill for the ratification of the title. Being unable to secure the speedy passage of the bill, the committee extended the time for the erection of the canning factory. The bill was passed on February 27, 1901, and the preserving company immediately commenced the construction of its plant and was ready for business in 1902.

Held, that one Horton, a signer of the subscription agreement, who stood by and saw the plant erected, without, in any manner, protesting or attempting to cancel his subscription because the plant was not erected in 1900, was estopped from repudiating his subscription upon that ground;

That the time when the factory in question was to be erected was not of the essence of the contract, but that the true meaning of the contract was that the preserving company would erect the factory as soon as title to the premises upon which it was to be built could be perfected;

That in an action brought by Horton against the preserving company to recover for produce which he had sold to the preserving company during the year 1902 under a written contract, the preserving company was entitled to interpose a counterclaim for the sum of thirty-three dollars and thirty-four cents, representing one-third of Horton's liability upon the subscription, it not appearing that the written contract contained a provision which would bar the preserving company from asserting that counterclaim;

That a representation made by the agent of the preserving company to Horton at the time the contract of sale was entered into, to the effect that no part of the value of the produce so bought would be deducted on account of the subscription agreement, was not binding upon the preserving company, it not appearing that the agent had authority to make such representation, or that the preserving company received the produce with knowledge of such representation.

APPEAL by the plaintiff, Willis B. Horton, from a judgment of the Supreme Court, entered in the office of the clerk of the county of Chautauqua on the 20th day of May, 1903, upon the decision of the court rendered after a trial before the court without a jury at the Chautauqua Trial Term, adjudging that the plaintiff recover a certain sum deposited in court by the defendant before the com-

mencement of the action, with interest, and awarding costs to the defendant.

The action was commenced on the 2d day of February, 1903, to recover for produce sold and delivered to the defendant during the season of 1902, under a contract in writing bearing date the 10th day of February, 1902, by the terms of which the plaintiff agreed to raise and deliver to the defendant, at its factory, the peas and corn which might be grown during the season of 1902 upon certain lands of the plaintiff, at a price specified in the contract; and the defendant on its part agreed to pay to the plaintiff any balance that might remain unpaid upon such crop or produce on the 22d day of January, 1903.

Upon such date, under the terms of the contract, there was concededly due and owing to the plaintiff a balance of $175.23. The plaintiff demanded payment of said sum from the defendant, which was refused, and instead the defendant tendered to the plaintiff the sum of $141.89 and $1.63, as interest, which the defendant claimed was the full amount of its indebtedness to the plaintiff, the defendant claiming the right to deduct from the amount due and owing to the plaintiff under the contract above referred to the sum of $33.34, being the amount, as is claimed, for which the plaintiff became indebted to the defendant by virtue of a subscription or agreement made by him, and which amount was set up as a counterclaim in defendant's answer. Such counterclaim, by the judgment appealed from, was allowed to the defendant, and its allowance raises the only question presented for review by this appeal.

George E. Towne, for the appellant.

Charles J. Bissell and *P. M. French*, for the respondent.

McLENNAN, P. J.:

The principal facts are not in dispute. On the 21st day of November, 1899, the Business Men's Association of Irving, Chautauqua county, N. Y., entered into an agreement in writing with the defendant, signed by the president and secretary of such association, which provided, in substance, that a committee of such association, named in such agreement, would procure a conveyance to the defendant of fifteen acres of land therein described, which

was a part of the Seneca reservation, and was owned by one Dennis, a Seneca Indian; and would procure the transfer of the title to such lands to be approved by act of Congress, which was necessary in order to perfect the same. Ratification or confirmation by Congress was agreed to be procured on or about January 1, 1900. Such committee also agreed to secure "from the residents and farmers of Erie and Chautauqua Counties, on or before February 1, 1900, a subscription list amounting in value to at least the sum of Ten Thousand Dollars, ($10,000) said sum to be paid to said Erie Preserving Company in fruits, produce, labor, team work or cash, within a period of three years from the time said Erie Preserving Company shall commence the operation of a canning factory on the above site." The defendant company on its part agreed to locate a canning plant on said site, and to begin canning operations thereat during the season of 1900.

On November 23, 1899, by another instrument in writing made between the parties, said first agreement was modified so as to provide that in case the committee did not secure in subscriptions the full amount of $10,000, if they used their best endeavors in that regard, the amount which they did raise would be accepted by the defendant in lieu of such $10,000, and would be regarded as a compliance by the committee with the obligation imposed upon it under the first contract.

On said 23d day of November, 1899, the defendant executed or caused to be executed and delivered to the committee a bond conditioned, in substance, for the faithful performance by the defendant of the obligations which it had assumed under such contract.

Immediately after the execution of the contracts in question, and the delivery of the bond executed by the defendant, the committee of the Business Men's Association undertook to secure subscriptions from the farmers of Erie and Chautauqua counties, as they had obligated themselves to do by the provisions of such contracts. The plaintiff, with many others, thereupon signed a subscription or agreement by which he obligated himself to pay to the defendant the sum of $100 in produce, during the years 1900, 1901 and 1902 equally, "for the purpose of inducing said Erie Preserving Company to locate their new canning factory at Irving, New York." It was recited in such subscription or agreement that the defend-

ant had shown willingness to locate a canning plant at Irving, N. Y., by giving a committee of the citizens of the village of Irving a bond in the sum of $1,000 to show its good faith, "provided a certain suitable site can be secured, and a reasonable subscription signed by the produce growers, workers and others who will be directly benefited by the location of their plant and business at Irving."

The plaintiff insists that such subscription or agreement signed by him was not enforcible in favor of the defendant, for the reason that the canning factory which, under its agreement with the committee, was to have been erected and ready for operation during the season of 1900, was not so erected and put in operation. Of course, the defendant could not erect and put its factory in operation upon the site described in the contract until title thereto was perfected, and that, as we have seen, depended upon ratification by act of Congress.

Immediately after the execution of the contracts in question the committee diligently set to work to procure title to the premises upon which the canning factory was to be erected. It procured a conveyance from Dennis, and the approval of the same by the council of the Seneca Indians, and a bill was introduced in Congress for the ratification of such title. All parties, so far as appears, were equally zealous in procuring the passage of such act, but for some reason it was not passed at that session of Congress, nor until the 27th day of February, 1901. After the title in the defendant had been confirmed by the passage of such act, the defendant went on and erected the canning plant upon the premises in question, and in all respects in accordance with the requirements of the contracts which it had entered into with the committee, the subscriptions of the plaintiff and other subscribers having been previously delivered to the defendant.

The evidence clearly indicates that when it was found that the lease could not be, or was not, ratified by Congress within the time specified in the contract, the committee urged the defendant to still go on with the enterprise and erect a canning factory, and that all the parties to the agreement assisted as far as possible in procuring the ratification of such lease under the date above referred to. In other words, the defendant was given to understand by the committee with which it contracted that if the lease was approved by

act of Congress, although at a date subsequent to that mentioned in the original contract, all the terms of such contract would be regarded as of full force and effect. In fact, as between the committee and the defendant, there is apparently no dispute. The time when the lease should be confirmed was not regarded as of the essence of the agreement, but the purpose was to secure a canning factory to be erected upon the premises in question at the earliest time practicable, and immediately upon the ratification of the lease of the premises, which was in February, 1901, the defendant entered upon the construction of its plant and was ready for business for the season of 1902.

The defendant, in the erection of its canning factory, has expended upwards of $50,000, and we think it must be held, upon the evidence, that such expenditure was induced by the subscriptions made by the plaintiff and others similarly situated, and thus such subscriptions became valid and binding obligations in favor of the defendant. (*Keuka College* v. *Ray*, 167 N. Y. 96.)

The chief contention on the part of the plaintiff is that the failure of the defendant to build the factory in 1900 released him from his subscription. The failure to so build was not due to any neglect or omission on the part of the defendant. It resulted because of circumstances which, as appears by the evidence, neither of the parties to the contract could control. The defendant was ready and willing to proceed with the erection of its canning plant as soon as title was obtained to the premises upon which it was to be built, and we think the plaintiff is not in a position to assert the invalidity of his subscription because of the failure of the defendant to erect its plant within the time specified in the contract. After the time in which defendant had agreed to erect its factory had elapsed for the reasons above indicated, the plaintiff stood by and saw it erected, presumably because of his and other subscriptions which were to contribute to and insure such erection, without in any manner protesting or attempting to cancel his subscription because such plant was not erected in 1900 instead of 1901. He stood by and saw the work go on, knowing as he must that it was in reliance, in part at least, upon the subscriptions which he and his neighbors had made, amounting in the aggregate to over $7,000; and he should be estopped from now claiming that his subscription was invalid and

of no force or effect, because of defendant's failure to erect and put in operation its factory at the time specified in the original agreement. (*Trustees, etc.*, v. *Smith*, 118 N. Y. 640.)

The time when the factory in question was to be erected was not of the essence of the contract. The true meaning of the agreement was that the defendant would erect such factory as soon as title could be obtained to the premises upon which it was to be built. Such plant was regarded by the plaintiff and other subscribers, as recited in the instrument executed by them, of great value to them and to the community, and we think it ought not to be held that they should be relieved from the obligations assumed by them, simply because the factory in question was not erected at the time specified in the contract entered into between the defendant and the committee, when, as clearly appears, the time of performance was extended by the committee.

It is also insisted that, when the plaintiff entered into the contract for the sale of his produce to the defendant, the agent of the defendant represented to him that no part of the value of the produce so bought would be deducted by reason of the subscription or agreement which the plaintiff had made. There is no evidence tending to show that defendant's agent had any right or authority to make such agreement, and there is no evidence which indicates that when the defendant received the produce of the plaintiff it knew or had any reason to believe that its agent had made any such representation or agreement. Besides, the plaintiff in this case declared upon a written contract, and it is nowhere alleged that it was induced by fraud or that it contained any provision which would bar the defendant from asserting any claim which existed in its favor against the plaintiff, and which, under the Code, was a proper subject of counterclaim.

We think the evidence fully justified the conclusion that a proper tender was made of the full amount of the defendant's indebtedness to the plaintiff.

It follows that the judgment appealed from should be affirmed, with costs.

All concurred.

Judgment affirmed, with costs.

In the Matter of the Petition of FRANK P. WILDER and THE CARTHAGE SULPHITE PULP COMPANY, Respondents, for the Appointment of Commissioners to Assess the Damages of Riparian Owners on Deer River, Pursuant to Chapter 565 of the Laws of the State of New York for 1903.

MARTHA A. SMITH and Others, Appellants.

An act declaring a river a public highway — when constitutional — provision for the payment of damages — such payment confers the right upon all, not simply on those who pay — effect of there being no payment for the bed of the stream as such — parties to a condemnation proceeding.

Chapter 565 of the Laws of 1903 declares Deer river and its tributaries "a public highway, for the purpose of floating logs, timber, lumber and other products of the forest down said stream." It provides that commissioners to appraise the damages "of the riparian owners on said stream," shall be appointed upon the petition of "any person or corporation desiring to use said stream or tributaries as a public highway," and that, "Upon the confirmation of such report, the person or persons, corporation or corporations desiring to use said stream and tributaries for the purposes aforesaid, shall pay or tender to the persons and corporations to whom damages are rewarded,* the amounts awarded respectively, and thereupon shall have the right to use said stream and tributaries as a public highway."

Held, that the statute was constitutional;

That the language of the act, that upon payment of the damages awarded the parties paying such damages "thereupon shall have the right to use said stream and tributaries as a public highway," was not designed to limit the user to the petitioners, but to fix the time when the user should commence;

That upon payment of the damages awarded, any person might avail himself of the privilege of floating logs down the stream without making further compensation to the riparian owners;

That the fact that the act only provided for the payment of damages to riparian owners and did not provide for the payment of damages to persons who owned the bed of the stream, but were not riparian owners, did not impair the validity of the act, it not appearing that there was any one who had title to the bed of the stream distinct from that which was incidental to riparian ownership.

Prior to the passage of the act, parties interested in having Deer river declared a public highway for the floating of logs, applied to the Supreme Court for an assessment of damages under the Condemnation Law in accordance with section 72 of the Navigation Law, as amended by chapter 613 of the Laws of 1902. Three hundred of the three hundred and thirteen riparian owners who were

* *Sic.*

parties to the proceeding failed to answer and judgment was entered against them by default. The remaining thirteen answered and the petitioners were subsequently permitted to discontinue the proceeding as against them upon payment of costs.

After the passage of chapter 565 of the Laws of 1903, the petitioners instituted a proceeding for the appointment of commissioners under that act against the thirteen parties who had answered in the prior proceeding.

Held, that it was not necessary that the three hundred riparian owners, against whom judgment by default had been rendered in the prior proceeding, should be made parties to the new proceeding.

APPEAL by Martha A. Smith and others from an order of the Supreme Court, made at the Onondaga Special Term and entered in the office of the clerk of the county of Lewis on the 17th day of August, 1903, appointing commissioners to assess damages to riparian owners on Deer river.

A. E. Kilby and *W. A. Porter*, for the appellants.

C. S. Mereness, for the respondents.

SPRING, J.:

The respondents presented their petition to the Supreme Court asking for the appointment of commissioners to assess the damages of certain riparian owners along Deer river and its tributaries, in pursuance of chapter 565 of the Laws of 1903, and the order appealed from appointing such commissioners was granted.

The act upon which the proceeding was based is entitled: "An Act declaring Deer River, and its tributaries, in the Towns of Montague, Pinckney and Denmark, in the county of Lewis, a public highway, and providing for the assessment and payment of damages to riparian owners thereon."

Section 1 declares Deer river and its tributaries "a public highway for the purpose of floating logs, timber, lumber and other products of the forest down said stream." Section 2 provides for the appointment of commissioners to appraise the damages "of the riparian owners on said stream" to be made upon the petition of "any person or corporation desiring to use said stream and tributaries as a public highway." The section, in defining the effect of the confirmation of the report of the commissioners, adds: "Upon the confirmation of such report, the person or persons, corporation or corporations desiring to use said stream and tributaries for the purposes

aforesaid, shall pay or tender to the persons and corporations to whom damages are rewarded,* the amounts awarded respectively, and thereupon shall have the right to use said stream and tributaries as a public highway."

The appellants appeared in opposition to the granting of the order, attacking, among other things, the validity of the act mentioned. It is apparent that it was the scheme of the Legislature to constitute this waterway a public highway for the transporting of logs and timber. It was at the instance of the interested petitioners, and doubtless largely for their benefit, but the fact that it established the river as a public highway is not incompatible with the proposition that the benefits of the act may exclusively accrue to these petitioners. (*Matter of Burns*, 155 N. Y. 23.) The language of the act, that upon the payment of the damages awarded those paying "thereupon shall have the right to use said stream and tributaries as a public highway," is not designed to limit the user to the petitioners, but to fix the time when such user may commence. It is to be noted also that such use is as a *public* highway which precludes an appropriation by the petitioners alone. The damages awarded, while paid by those directly benefited, are upon the assumption that the stream is a public highway, and are the full measure of compensation to which the riparian owners are entitled, whoever may avail themselves of the privilege of floating logs down the stream. However a public highway may come into existence, when once established there is no limitation of its use to certain individuals. If so it is not a *public* highway. The framework of the act is founded upon the constitution of the stream as a public highway, and that is recognized in the clause referred to as well as throughout the entire act.

The act itself closely follows in its title and context chapter 338 of the Laws of 1896, which was passed for a like purpose with the one under review, and the constitutionality of that act was upheld in *Matter of Burns* (155 N. Y. 23). The only distinction between the two acts is the clause quoted, designed to designate the date when the petitioners may commence floating logs.

It is further contended that the act is invalid in that it only provides for the award of damages to riparian owners, not including damages which may inure to owners of the bed of the stream,

* *Sic.*

independent of riparian ownership. The act in this particular is identical with the one after which it is patterned, although the present one provides for a service of a copy of the petition on occupants as well as owners. While no discussion of this alleged defect seems to have been had in the *Burns* case, yet the analysis of the act in that opinion was solely for the purpose of determining as to its legality. The expression "riparian owners," in its ordinary and popular signification, carries with it the title to the center of the non-navigable stream upon which their land abuts. The supposition is that the title of an abutting owner on any highway extends to the center of such highway. If damages were to be appraised to those injured by reason of any unusual appropriation of the highway, a requirement that owners along the same should be notified of any application for the ascertainment of damages we assume would be entirely adequate. In the present proceeding, while this objection is presented, there is no proof in the record indicating title in any one to the bed of the stream, distinct from that which is incidental to the riparian title. That being so, we have a right to assume, until the contrary appears, that the term "riparian owners" embraces the title to the land over which the water flows. This is also the legal presumption. (*Ex parte Jennings*, 6 Cow. 518, note, cited approvingly in *De Camp* v. *Thomson*, 16 App. Div. 528, 532; *Wilcox* v. *Bread*, 92 Hun, 9; affd. on opinion below, 157 N. Y. 713; 4 Am. & Eng. Ency. of Law [2d ed.], 828).

In *Brewster* v. *Rogers Co.* (42 App. Div. 343) the court held that the act (Laws of 1893, chap. 363) was unconstitutional, for the reason that no provision was made for the payment of damages to the owners of the bed of the stream. That act, however, made no provision at all for the ascertainment of damages to any one. It was sought to uphold it by construing it in connection with the general statute (Laws of 1880, chap. 533, as amd. by Laws of 1897, chap. 483), which did provide for assessing damages, but not distinctly to the owners of the bed of the stream. The Appellate Division held that the failure of the general act and of the special act of 1893 to provide compensation for the bed of the stream rendered it nugatory. The Court of Appeals (169 N. Y. 73, 78) in affirming the judgment declined to pass upon that objection, but affirmed upon other grounds. The action was for damages caused

by the defendant in damming up the river to hold his logs and then letting out the water in such quantities that it injured the dam and sawmill of the plaintiff, the riparian owner. The river had long been a public highway and the damage was caused by the extra volume of water which the defendant had accumulated and discharged upon the plaintiff's property. The case was decided in the Court of Appeals on the ground that an action would lie, and the damages were not necessarily to be ascertained by condemnation proceedings. It also declared that the act was invalid because the person intending to float logs in the stream was permitted to give a bond indemnifying those sustaining loss by reason of the use of the river by him pursuant to the act. That is, that the riparian owner was not certain to obtain the compensation to which he was entitled by reason of the appropriation of the river.

In *Matter of Thomson* (86 Hun, 405; affd. on opinion below, 147 N. Y. 701) and *De Camp* v. *Dix* (159 id. 436) the acts construed only provided for compensation to the owners of booms or dams upon the stream, and are not applicable to the question now under consideration.

We have in this case, as already intimated, the bare suggestion that the title of the bed of the stream may be disconnected from the ownership along its bank. If that appears, perhaps the question may be a troublesome one, but it is not as now presented.

A like proceeding was commenced in the Supreme Court for the assessment of damages under the Condemnation Law (Code Civ. Proc. §§ 3357–3384) in accordance with section 72 of the Navigation Law (Laws of 1897, chap. 592), as amended by chapter 613 of the Laws of 1902. There were 313 riparian owners. Three hundred did not answer, and the court at Special Term allowed judgment against those in default, and an order of discontinuance as to those answering upon payment of costs by the petitioners. After the passage of the act of 1903 the present proceeding was commenced against those answering in the previous proceeding, but those against whom the judgment was entered were not made parties in the new application. The present defendants insist that all must be brought in. A valid judgment appointing commissioners and providing for the assessment of damages is in force effective to award compensation to those owners, and they are not seeking to be relieved there-

from. In the two proceedings all the damages can be ascertained, and we can see nothing equitable in the contention of the present defendants, if their rights are assured to them, either by dismissal of the petition or by the award of damages to them. They have little interest in the rights of other riparian owners. If the proceeding, culminating in the appointment of other commissioners, is ineffective to establish the stream as a public highway, then the petitioners are the sufferers, not the appellants. There is no legal objection to the mode adopted. (*City of Johnstown* v. *Wade*, 30 App. Div. 5; appeal dismissed, 157 N. Y. 50; *Brooklyn El. R. R. Co.* v. *Nagel*, 75 Hun, 590; affd., 150 N. Y. 562.)

If the petitioners had obtained consents or releases in due form from the 300 petitioners, who were parties to the former proceeding as to all damages which they might sustain by reason of the appropriation of the river, we assume it would not be necessary to serve notice of the application upon them. The defendants would have no interest or concern in that matter.

We think the order should be affirmed, with costs.

All concurred.

Order affirmed, with costs.

BUEDINGEN MANUFACTURING COMPANY, Plaintiff, *v.* THE ROYAL TRUST COMPANY OF CHICAGO, Defendant.

Principal and surety — repudiation of contract because of defects in the goods manufactured thereunder — a provision for the payment of freight charges to a particular place, construed as an allowance to be made on shipments to any place — payment for goods manufactured, when due — introduction of certain letters justifies the putting in evidence of the entire correspondence — duty to move to strike out evidence — proof of letters between the principals in an action against a surety.

One Whipple, who was exploiting a toy called the Dewey puzzle, entered into a contract with a manufacturing company by which the latter agreed to manufacture 800,000 of the puzzles at $15 per 1,000, "and deliver by freight, freight and cartage paid to some address to be designated in New York City below Twenty-third Street." The agreement further provided: "All work as fast as finished to be held subject to the shipping instructions of the second party (Whipple), and to be considered as property of the second party after comple-

tion. The first party agrees to hold subject to shipping orders the entire order if desired until time specified for completion."

In compliance with an agreement by Whipple to furnish a written guaranty from the Royal Trust Company of Chicago to secure the payment of the contract price, the trust company wrote the manufacturing company the following letter:

"GENTLEMEN.— This bank will honor your thirty day drafts to the extent of forty-five hundred ($4,500) dollars, provided they are accompanied by schedules as specified in the contract between your company and J. C. Whipple of Chicago, dated July 1, 1899, and providing said schedules are delivered in accordance with the terms of said contract and the other terms of the contract are complied with by you."

The first shipments of the puzzles contained a number of defective puzzles, which the manufacturing company offered to replace with perfect ones. At first Whipple and the Dewey Puzzle Company, a corporation formed by him to exploit this puzzle, showed a willingness to accept this disposition of the matter, but finally assumed to rescind the contract because of the defective puzzles and notified the trust company to refuse to pay any more drafts drawn by the manufacturing company.

In an action brought by the manufacturing company against the trust company upon its agreement, it was

Held, that the trust company's liability was that of a surety and not that of an original promisor;

That the puzzles being a new article manufactured at a small cost, the fact that some of them were defective did not entitle Whipple to repudiate the contract; that it was contemplated by the parties that the defective puzzles should be replaced by the manufacturing company;

That the purpose of the provision in the contract that the puzzles should be shipped "to some address to be designated in New York City below Twenty-third Street," was to fix the amount of freight charges for which the plaintiff was liable and not to fix the place of delivery;

That under the contract the plaintiff was entitled to payment when it manufactured the goods and had them ready for shipment;

That the defendant having placed in evidence certain letters could not complain of the action of the plaintiff in placing the rest of the correspondence in evidence;

That if any of the correspondence introduced by the plaintiff was not called for by the letters received on behalf of the defendant, it was the duty of the defendant to move to have them stricken out.

Semble, that as the defendant was simply the paymaster under the contract, letters passing between Whipple and the plaintiff, which bore upon the question whether the plaintiff had performed the contract, were admissible against the defendant.

MOTION by the defendant, The Royal Trust Company of Chicago, for a new trial upon a case containing exceptions, ordered to be heard

at the Appellate Division in the first instance, upon the verdict of a jury in favor of the plaintiff rendered after a trial at the Monroe Trial Term.

Charles J. Bissell, for the plaintiff.

Walter S. Hubbell, for the defendant.

SPRING, J.:

The plaintiff is a manufacturing company in the city of Rochester. In 1899 one J. C. Whipple of Chicago was exploiting a patent toy riddle called the Dewey puzzle, and under date of July 1, 1899, entered into a contract with the plaintiff whereby it agreed to manufacture 300,000 of these puzzles for fifteen dollars per 1,000. Twenty-five thousand were to be completed by August twelfth and the entire order of 300,000 on or before September thirtieth of that year. A description of the samples was contained in the agreement and Whipple therein agreed to furnish six marbles of assorted colors for each puzzle box, a certain proportion to be delivered to the plaintiff at Rochester on or before August first, and the balance before August seventeenth. In case of failure to deliver the marbles "as herein specified the putting into the puzzles of the marbles will be forfeited."

The puzzles were to be boxed in pasteboard cartons "and delivered by freight, freight and cartage paid, to some address to be designated in New York City below Twenty-third Street." The agreement further provided: "All work as fast as finished to be held subject to the shipping instructions of the second party (Whipple), and to be considered as property of the second party after completion. The first party agrees to hold subject to shipping orders the entire order if desired until time specified for completion."

Under the same date a further or collateral contract was entered into between the same parties relating to the manner and time of payment. The said Whipple agreed "to furnish the party of the first part (the plaintiff) a written guarantee from the Royal Trust Company Bank of Chicago, Ill.," and which would secure to the plaintiff the payment of the contract price for manufacturing the puzzles. The party of the first part agreed to furnish a schedule to "be based upon verified statements from party of the first part

that stated quantities of said puzzles have been finished and are ready for delivery. * * * Terms to be 30 days net or 2% for cash in 10 days on weekly statements furnished by first party to the second party."

In compliance with this agreement the defendant wrote to the plaintiff the following letter:

"*July* 1, 1899.

"BUEDINGEN MANUFACTURING CO., 90 W. Broadway, New York.

"GENTLEMEN.— This bank will honor your thirty day drafts to the extent of forty-five hundred ($4,500.00) dollars, provided they are accompanied by schedules as specified in the contract between your company and J. C. Whipple of Chicago, dated July 1, 1899, and providing said schedules are delivered in accordance with the terms of said contract and the other terms of the contract are complied with by you.

"Yours truly,

"ROYAL TRUST CO."

This letter in connection with the agreements recited, constitutes the contract upon which the plaintiff planks its cause of action against the defendant. The plaintiff at once began the manufacture of the puzzles and shipped out upon the order of Whipple 30,000 to 35,000 in lots of 5,000 or 10,000 to various places, Des Moines, Ia., Chicago, St. Louis, Atlantic City and New York, the last shipment being to the latter place. The goods did not meet the sale anticipated, and the project fell flat. It is apparent that many of the first shipments of the puzzles contained those which were defective. Some were stored in Whipple's barn in Chicago, and two years later were examined and witnesses testified that a large number were improperly made, the most frequent defect being the fading of the picture of Dewey on the outside of the puzzles, and often this portrait was pasted on unevenly.

Early in the shipment of the goods Whipple, either in his own name or in that of the Dewey Puzzle Company of Chicago, which was a corporation formed by Whipple and one Riley to exploit these puzzles, informed the plaintiff of the defects, and an extended correspondence ensued in regard to them. The plaintiff promptly informed Whipple that it had on hand a large quantity of the puzzles conforming to the agreement and offering to pay the

freight charges for reshipping the defective puzzles to Rochester, and agreeing to return good puzzles free of charge in their stead. Evidently Whipple was bent on terminating his agreement and thus getting from under a bad venture and eventually declined to permit this substitution. Before the Dewey Company appreciated the utter failure of the scheme it intended to hold the plaintiff for the imperfect puzzles rather than to consider the agreement terminated by reason of such imperfections. In its letter of September eighth, and which was sometime after most of the puzzles shipped had been received, occurred the following: "It becomes our duty now to advise you that all imperfect puzzles will be held subject to your order as we cannot use imperfect goods. Please let us hear from you immediately, and we will advise you to stop making puzzles or find and rectify the mistakes which are being made, otherwise you will have a number of goods on your hands, for, as stated above, we cannot accept them in the condition they are in."

Again, under date of September twelfth, the Dewey Puzzle Company, in a letter to the plaintiff, say: "The imperfect puzzles that we find will be returned to you at your expense, freight both ways, and whatever expense is incurred in sorting out these puzzles will be charged to you."

The plaintiff replied to the first letter referred to, explaining the reason for the imperfections in the earlier shipments of the puzzles, and adding: "The imperfect puzzles had better be returned to us by freight, when we will have them all carefully gone over and put in proper condition. We, of course, will stand all transportation charges. We do not believe that you will find more than probably 10% of the entire lot imperfect. Whatever the amount is we will rectify."

This was reiterated in a letter bearing date September fifteenth, the plaintiff writing: "Whatever you find imperfect you may return to us at our expense and we will send you perfect ones in place."

Finally, on October fifth, the puzzle company, in a long letter going over the defects complained of, undertook to rescind the agreement, advising the plaintiff it held the puzzles on hand subject to the order of the plaintiff and demanded the return of the money paid. The plaintiff had then manufactured 200,000 puzzles, the great bulk of which was in stock in its manufactory at Rochester,

and 100,000 had been cut out and were in process of construction. On the twenty-eighth of August the defendant had accepted one of the drafts sued on which was payable September twenty-seventh. Under date of September twenty-third the defendant wrote a letter advising the plaintiff as follows: "We hereby notify you that we have been notified by Mr. Whipple not to accept or pay any drafts to your company, until further notice, for the reason that the goods being manufactured are not according to contract. After your dif ferences have been adjusted they will doubtless notify us to proceed further."

On the same day the defendant received another one of the drafts from the plaintiff set out in the complaint and to which was attached the required verified statement. The defendant returned the draft to the plaintiff, accompanied by a letter saying: "Herewith we return you said draft for the reason that we have been notified by Mr. Whipple to accept no more drafts for the reason that the goods were not being manufactured and delivered according to contract."

All the drafts which were accepted by the defendant and not paid are set out in the complaint, and the recovery of the plaintiff extended not only to the 200,000 puzzles manufactured, but to the 100,000 which were in process of manufacture less the cost of completing the sale.

The plaintiff contends that the defendant is an original promisor. The defendant on the contrary insists that its contract is one of guaranty and must be governed by the strict rules applicable to that relation. The court below instructed the jury as matter of law that the contract was one of suretyship, and we feel bound to accept that instruction as the correct statement of the liability of the defendant, whatever may be our views upon the subject uncontrolled by the direction of the trial court. From our interpretation of the case, however, the question is one of very little moment.

Much of the testimony given upon the trial was taken up with a consideration of the alleged defects in the puzzles. That quite a substantial percentage of the goods first shipped were imperfect in some particulars was apparent. We must, however, bear in mind that they were cheaply made, costing only one and one-half cents apiece; that they were a new venture and it was not intended that they should be skillfully or artistically manufactured. We think it

may fairly be said to be within the contemplation of the parties that whatever defective puzzles were in the first shipments should be remedied by the plaintiff. The correspondence both on the part of Whipple and the defendant warrant this inference. The plaintiff produced quite a large number of witnesses who examined the puzzles stored in the plaintiff's warehouse in Rochester and the trend of their testimony is that these puzzles complied with the agreement. The plaintiff in essential particulars was meeting the duty upon it to manufacture the articles substantially according to the contract, and manifested a willingness to compensate for deficiencies in those shipped on the orders of Whipple. This question was submitted to the jury, and we are not disposed to hold as matter of law that the fact that defective puzzles were shipped, in the light of the circumstances which appear, debar the plaintiff from recovering the fruits of its labor in pursuance of its agreement.

It is insistently urged that the plaintiff failed to comply with that part of its undertaking which required it to ship the puzzles "to some address to be designated in New York City below Twenty-third Street." This provision, it seems to us, was designed not to require shipments to be made to New York city, but to fix the amount of the freight charges for which the plaintiff was liable. The parties put that construction upon it because in the western shipments the plaintiff was allowed for the excess of such charges above the cost to send to New York city. The contract further provided that "all work as fast as finished to be held subject to the shipping directions of the second party" (Whipple), and it was to be his property "after completion." The delivery, therefore, was at the factory of the plaintiff, and payment was to be made by the defendant, not upon the delivery in New York or elsewhere, but when "said puzzles have been finished and are ready for delivery." Again, no place below Twenty-third street, in New York, was ever designated to the plaintiff. Whipple or the Dewey Puzzle Company gave shipping instructions as the contract contemplated, which the plaintiff conformed to, and it was not until the last shipment that any were ordered shipped to New York. No complaint was made that the plaintiff was disregarding its obligation by shipping wherever ordered by Whipple. The puzzles belonged to him, and he could have them sent wherever

he listed. Even strictly construed, the clause requiring shipment to New York was not a condition precedent to recovery. The goods might remain in the custody of the plaintiff for any length of time and the defendant would be liable to pay for them. The plaintiff was to defer the enforcement of its compensation until Whipple made sales or ordered away the puzzles. Its pay day came when it manufactured the goods and had them ready for shipment.

The counsel for the appellant complains vigorously over the reception in evidence of eight letters on behalf of the plaintiff. Four of these were written by the plaintiff to Whipple or to the Dewey Puzzle Company and the others by Whipple for himself or representing the puzzle company to plaintiff. Several of them related wholly to the bad condition of the marbles which Whipple had supplied the plaintiff to place in the puzzles. There is no controversy over this subject, for the proof shows unmistakably that many of the marbles were defective. Exhibit 14 was put in evidence by the defendant and that relates in part to the condition of the marbles. Exhibit 36, one of the alleged obnoxious letters, is replied to by defendant's exhibit 13, as is also exhibit 37. Another exhibit, 38, is a reply to defendant's exhibit 22. That is, the defendant insisted in reading certain letters in evidence. This opened the door so that the plaintiff was entitled to the full correspondence bearing upon the subject discussed in the defendant's exhibits. The defendant having blazed the trees cannot justly complain because the plaintiff followed along in the trail marked. (*Scattergood* v. *Wood*, 79 N. Y. 263; *Grattan* v. *Met. Life Ins. Co.*, 92 id. 274, 284.)

If there was anything in plaintiff's exhibits not properly called for by the letters received on behalf of the defendant, the objectionable portions ought to have been called to the attention of the court and undoubtedly they would have been expurgated. It seems to us as an original proposition that these letters were admissible. The contracts were between Whipple and the plaintiff. The contract of the defendant was made dependent upon these agreements. The performance of the agreement pertaining to the manufacture and shipment of the puzzles was between Whipple and the plaintiff. The puzzles were to be satisfactory to Whipple and the defendant had nothing whatever to do with this part of the agreement. It was

simply the paymaster. The letters passing between Whipple and the plaintiff are significant to elucidate the questions litigated. Irrespective of this proposition, however, the letters, as I have already attempted to show, were competent.

The defendant's exceptions should be overruled and its motion for a new trial denied, with costs, and judgment ordered for the plaintiff on the verdict.

All concurred, except McLENNAN, P. J., not voting.

Defendant's exceptions overruled, motion for new trial denied and judgment ordered for the plaintiff on the verdict, with costs.

FRED W. M. HEERWAGEN, as Comptroller of the City of Buffalo, Respondent, v. CROSSTOWN STREET RAILWAY COMPANY OF BUFFALO and Others, Appellants.

Municipal right to dispose of street railroad franchises — a sum paid annually therefor is "in the nature of a tax" — such amount should be deducted from the special franchise tax — what local taxes should not be so deducted — form of the special franchise tax assessment — such tax is not a violation of the Milburn agreement.

The power to grant franchises for the construction of railroads in the streets of a municipality is vested in the State, and the Legislature, in committing to municipalities the right to dispose of such franchises, may place restrictions upon the exercise of such right and the municipalities must keep within such restrictions.

A tax is an involuntary proportional payment made by a property owner toward the expenses of a municipality or State, and the fact that money is paid to a city by a street railway company, in remuneration for its right to do business, is not incompatible with the proposition that such payment is "in the nature of a tax."

Section 8 of chapter 252 of the Laws of 1884 provided that in cities having a population of 250,000 or more, which included the city of Buffalo, every street railway company should pay annually for five years into the treasury of the city to the credit of the sinking fund thereof three per cent of its gross receipts and, after the expiration of five years, five per cent of such gross receipts.

Chapter 65 of the Laws of 1886, as amended by chapter 642 of the Laws of 1886 and by chapter 564 of the Laws of 1889, provided that as a condition of obtaining the consent of the local authorities of a city to the construction of a street railroad therein, "the right, franchise and privilege of using the said street * * * shall be sold at public auction to the bidder who will agree to give the largest percentage per annum of the gross receipts of said company

or corporation," but expressly retained in force the percentages authorized by the act of 1884 above mentioned.

The Crosstown Street Railway Company, which operates a street railway in the city of Buffalo, was organized February 5, 1890, pursuant to chapter 252 of the Laws of 1884, as amended. February sixth it purchased at a public auction the franchise to construct its railroad upon certain streets in the city of Buffalo, its bid, which was the highest, being eleven and three-fourths per cent of its gross earnings.

There were in 1892 two other street surface railroads in the city of Buffalo and the three were operated independently of each other, thus involving the payment by passengers of double fares and transfer charges.

A petition having been presented by one of such other railroads to the common council of the city for authority to make a traffic arrangement with the Crosstown Street Railway Company, whereby each might use the line of the other, the matter was referred to a committee to examine into the propositions of the several companies. As a result thereof, an agreement known as the Milburn agreement was entered into on January 1, 1892, by which transfer charges and double fares were abolished and by which the railway companies agreed, in lieu of the percentages of the gross receipts theretofore paid by them, to pay annually two per cent of their gross receipts when the same were less than $1,500,000, two and a half per cent when their receipts were more than $1,500,000 and less than $2,000,000 and three per cent when the gross receipts were over $2,000,000. This agreement was subsequently sanctioned by an act of the Legislature (Laws of 1892, chap. 151) which expressly relieved the railroad companies from the payment of percentages except those provided for in the agreement.

In 1899 the Legislature passed the Special Franchise Tax Law (Laws of 1899, chap. 712) making the franchises of street railway companies taxable as real estate. Section 46 of the Tax Law, added by said statute, provides: "If, when the tax assessed on any special franchise is due and payable under the provisions of law applicable to the city, town or village in which the tangible property is located, it shall appear that the person, co-partnership, association or corporation affected has paid to such city, town or village for its exclusive use within the next preceding year, under any agreement therefor, or under any statute requiring the same, any sum based upon a percentage of gross earnings, or any other income, or any license fee, or any sum of money on account of such special franchise, granted to or possessed by such person, co-partnership, association or corporation, which payment was in the nature of a tax, all amounts so paid for the exclusive use of such city, town or village except money paid or expended for paving or repairing of pavement of any street, highway or public place, shall be deducted from any tax based on the assessment made by the State Board of Tax Commissioners for city, town or village purposes, but not otherwise; and the remainder shall be the tax on such special franchise payable for city, town or village purposes."

Held, that the percentage of its gross receipts paid by the Crosstown Street Railway Company under the Milburn agreement was a payment "in the nature of a

tax" within the meaning of section 46 of the Tax Law and should be deducted from the amount of the franchise tax assessed against that corporation;

That percentages of their gross receipts paid by street railway companies pursuant to the provisions of chapter 252 of the Laws of 1884 and chapter 65 of the Laws of 1886 and the subsequent amendments thereof, are payments in the nature of a tax and should, under the terms of section 46 of the Tax Law, be deducted from the franchise tax assessed against such street railway companies;

That section 46 of the Tax Law was not designed to provide for the deduction, from the franchise tax payable by a street railway company, of lamp taxes, license fees and taxes for the maintenance of the police and health departments imposed by the municipality upon the street railway company; that the only deductions provided for in the statute were those based upon payments by the street railway company to the municipality of percentages of its gross receipts;

That the franchise tax assessment levied upon the Crosstown Street Railway Company was not rendered invalid because the entire amount thereof was placed upon the assessment roll of the ward in which the principal office of the corporation was located, instead of being divided among the various wards or tax districts of the city;

That the imposition of the special franchise tax did not constitute a violation of the Milburn agreement, there being nothing in the agreement indicating an intention to relieve the street railway company from the payment of any tax which the Legislature might impose upon its property.

McLENNAN, P. J., and HISCOCK, J., dissented.

APPEAL by the defendants, the Crosstown Street Railway Company of Buffalo and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Erie on the 13th day of October, 1902, upon the decision of the court rendered after a trial at the Erie Trial Term, a jury having been waived.

Porter Norton, for the appellants.

Charles L. Feldman and *Percy S. Lansdowne*, for the respondent.

SPRING, J.:

This action was commenced to recover a tax for the fiscal year, 1900–1901, levied against the franchise of the defendant, the Crosstown Street Railway Company, in accordance with the Special Franchise Tax Law (Laws of 1899, chap. 712 as amd.) and which tax it is

claimed was due and unpaid to the city of Buffalo. The defendant had paid to the city within the year next preceding the maturity of the tax certain percentages which it contended should be deducted from the amount of the tax in compliance with section 46 of the Tax Law (Laws of 1896, chap. 908, added by Laws of 1899, chap. 712) which deduction the plaintiff declined to allow. The construction of that question is the central question to be considered upon this appeal.

The defendant, the Crosstown Street Railway Company, is a domestic street surface railroad corporation organized on the 5th day of February, 1890, pursuant to chapter 252 of the Laws of 1884, as amended, and is operated within the city of Buffalo, N. Y. By this act, which is entitled "An act to provide for the construction, * * * of street surface railroads," the consent of the local authorities of a city to the construction of such railroads along its streets was provided for and a sale of the franchise at public auction was permitted (§§ 3, 4, 7). By section 8 of the act every such corporation constructing or operating a railroad within any city of the State "having a population of two hundred and fifty thousand or more," which included the city of Buffalo, was obliged for five years to pay annually into the treasury of the city where its road was operated "to the credit of the sinking fund thereof, three per cent of its gross receipts," and, after the expiration of five years, five per cent of such gross receipts. As to cities not containing 250,000 inhabitants the local authorities were permitted at their option to sell the franchise to the highest bidder (§ 7) or to require without a sale, as a condition of granting their consent, the annual payment of a percentage of the gross receipts not exceeding three per cent, as they might elect (§ 8). They could not order the sale and also impose the percentage assessment. They had the election of the two remedies, not the authority to impose both.

The Cantor act, so called (Laws of 1886, chap. 65, as amd. by Laws of 1886, chap. 642, and Laws of 1889, chap. 564), was thereafter passed, entitled "An act to secure adequate compensation for the right to construct * * * street railroads in cities and villages." By section 1 of the act, as amended by chapter 642 of the Laws of 1886 and chapter 564 of the Laws of 1889, it was required of the local authorities of a city as a condition of granting its consent

to the construction or extension of a street railroad over any of its streets "that the right, franchise and privilege of using the said street * * * shall be sold at public auction to the bidder who will agree to give the largest percentage per annum of the gross receipts of said company or corporation," but the section expressly retained in force the percentages authorized by the act of 1884 above mentioned. Section 7 of the statute of 1884 was repealed by the statute of 1886.

The Railroad Law (Laws of 1890, chap. 565) was thereafter enacted, article 4 of which pertains to street surface railroads. So far as concerns any inquiry germane to the present discussion it made no essential change in the payment of percentages. The only method by which any city or village was enabled by that act to derive any revenues from the sale of its franchises was upon the percentage system. (§§ 93, 95.) By section 180 of this act all the acts above mentioned, viz., chapter 252 of the Laws of 1884, section 1 of chapter 65 and chapter 642 of the Laws of 1886, and chapter 564 of the Laws of 1889, were repealed. The act took effect May 1, 1891, and since that time the only sale of a franchise permitted by municipal authorities has been upon a percentage of its gross earnings. There has in fact been no time since the act of 1884, and prior to the sale of the franchise in question, when in the city of Buffalo the sale of a franchise to a street surface railroad company was permissible except upon payment by percentages and that system came into being by that act. The Railroad Law was enacted after the sale to the defendant and of course it is of no importance to the subject under review.

The necessity of obtaining the consent of the local authorities to the construction of a street railroad has long been required by the State Constitution (Const. of 1846, art. 3, § 18, added in 1874 and continued in the same article and section of the Constitution of 1894.) The franchise, however, including the control of the streets, is in the State (*Adamson* v. *Nassau Electric R. R. Company*, 89 Hun, 261), but the tendency has been to commit to the municipal authorities the right to dispose of the same. (*Skaneateles W. W. Co.* v. *Village of Skaneateles*, 161 N. Y. 154, 165; *Barhite* v. *Home Telephone Company*, 50 App. Div. 25, 31.)

The Legislature in its delegation of authority may place restric-

tions upon its exercise, and as the agent must keep within his restricted authority so the municipality must keep within the compass of the grant conferred. The sale of the franchise could, therefore, only be had upon percentages, for the sovereign power so decreed. The defendant or any other railroad company desiring to construct and operate a railroad within the city of Buffalo must pay for that privilege. That payment must be to the city and by annual charge at a fixed rate.

On the 6th of February, 1890, the Crosstown Railway Company was the highest bidder at a public sale made by the comptroller of the city of the privilege or license to use certain streets set out at large in the notice of sale for the purpose of constructing and operating a street surface railway. Its bid was eleven and three-fourths per cent of its gross earnings, and it entered into the agreement stipulated for in the notice of sale. The said company was thus obliged for five years to pay the three per cent of its gross receipts and thereafter five per cent thereof conformably to section 8 of chapter 252 of the Laws of 1884, and in addition the percentage assumed by its bid in the open market and its consequent agreement.

In 1892 there were two other street surface railroad companies in the city of Buffalo, and the three were operating independently of each other. The Buffalo Railway Company charged a transfer fare of three cents for every passenger passing from one of its cars to one operated by either of the other companes. The defendant company charged five cents for a continuous trip to a passenger over its line. One of these companies was paying thirty-six per cent of its gross receipts into the treasury of the city. A petition was presented by the Buffalo Railway Company to the common council for authority to make a traffic arrangement with the defendant company whereby each might use the line of the other. Various propositions were made to the council by the several companies pending these negotiations, and differences arose and the whole matter was relegated to a committee of three prominent citizens to examine into the propositions of the several companies and resulted in a report and agreement conformably thereto known as the Milburn agreement, which was entered into as of January 1, 1892. By this agreement transfer charges and double fares were abolished. A new system of percentages was adopted as a substitute for those theretofore

assumed by the companies, and each agreed to pay annually two per cent of its gross receipts when the same were less than $1,500,000, two and one-half per cent when such receipts were less than $2,000,000 and over the first sum stated, and three per cent when such receipts were over $2,000,000. This agreement subsequently received the sanction of the Legislature (Laws of 1892, chap. 151), and the percentages have since been paid in compliance therewith. The approving act expressly relieves the railway companies from the payment of percentages except those provided for and reserved in and by such contract.

In 1899 (Chap. 712) the Legislature enacted the Special Franchise Tax Law, which amended several sections of the Tax Law (Laws of 1896, chap. 908) and also added certain sections thereto and brought within the general definition of "land" or "real estate" the right, privilege or franchise to construct or operate street surface railroads. (Tax Law, § 2, subd. 3 as amd. by Laws of 1899, chap. 712.) Upon the valuation fixed by the State Board of Tax Commissioners of such a franchise within a given city the local authorities of such city levy its tax. (Id. § 42, added by Laws of 1899, chap. 712 and amd. by Laws of 1900, chap. 254.) The taxes so levied, however, are payable to the localities and are subject to certain specific deductions prescribed in section 46 of the Tax Law (added by Laws of 1899, chap. 712) which, so far as material, reads as follows: "If, when the tax assessed on any special franchise is due and payable under the provisions of law applicable to the city, town or village in which the tangible property is located, it shall appear that the person, co-partnership, association or corporation affected has paid to such city, town or village for its exclusive use within the next preceding year, under any agreement therefor, or under any statute requiring the same, any sum based upon a percentage of gross earnings, or any other income, or any license fee, or any sum of money on account of such special franchise, granted to or possessed by such person, co-partnership, association or corporation, which payment was in the nature of a tax, all amounts so paid for the exclusive use of such city, town or village except money paid or expended for paving or repairing of pavement of any street, highway or public place, shall be deducted from any tax based on the assessment made by the State Board of Tax Commissioners for city, town or village purposes, but

not otherwise; and the remainder shall be the tax on such special franchise payable for city, town or village purposes." The act was a new contribution to our State taxing law. It put life into a privilege or license or franchise unquestionably often of great value and brought it within the dominion of the tax gatherer as taxable property. (*People ex rel. Met. St. Ry. Co.* v. *Tax Comrs.*, 174 N. Y. 417; *Kronsbein* v. *City of Rochester*, 76 App. Div. 494, 499 *et seq.*) It placed the power of determining the valuation in a State board, but required this valuation to be spread upon the local assessment roll by the assessors. In order to avoid any double payment of taxes to the localities, it provided for deduction of moneys paid to them pursuant to statute or agreement of "any sum based upon a percentage of gross earnings, or any other income, or any license fee or any sum of money on account of such special franchise," providing only that such payment partake of the characteristics of a tax. The municipalities were already benefiting from the use of the streets by railroads by reason of sums paid into their treasuries and applied toward the expenses of the municipalities, thus ameliorating the tax burden which would otherwise be borne by other property owners. To the extent of these payments, in so far as they were in the nature of a tax, they were to be allowed to the person or company assessed for a special franchise.

The Legislature evidently had in mind existing conditions and legislated with reference to them. While putting a new class of property upon the assessment roll it still appreciated that by certain statutes the right of the sovereign power in the streets had been transmitted to the localities. That accompanying the delegation of the power was the authority to dispose of the street franchise for defined purposes and in a specific manner to the end that the public was to be benefited by the operation of street railroads and the local body politic by an annual enhancement of its revenues which indirectly was tantamount to or partook of the nature of a tax.

"A tax is a forced contribution from a citizen to the State to be applied to governmental purposes." (Davies System of Taxation, 1.)

It is the involuntary proportional payment by a property owner toward the expenses of the municipality or State. The tax is imposed without his consent. A payment "in the nature of a tax" must in its general aspects partake of these characteristics.

The original statute (Laws of 1884, chap. 252, §§ 7, 8) fixing the percentages and requiring their payment into the treasury "to the credit of the sinking fund" levied the amount which the corporation operating the railroad in the streets of a city must contribute. The corporation paying had no voice in fixing the sum to be paid. It was an annually recurring charge which savored of a tax. It was fixed by statute and was an exaction of money upon the earning capacity of the property and the defendant contributed it toward the expenses of the municipality. We think these percentages were clearly within the exemption prescribed by section 46 of the Tax Law (*supra*). Chapter 65 of the Laws of 1886 and the subsequent amendments are each entitled, "An act to secure adequate compensation for the right to construct * * * street railroads in cities." Each act in terms provides for a sale to the highest bidder, so the element of compensation does enter into the transaction, but the defendant in order to operate its railroad in the streets of Buffalo was obliged to acquire the right in the manner prescribed by the statute. While it was a free bidder in the sense that it was not required to bid, yet if it constructed its railroad at all it must pay an annual charge to the city for so doing. To that extent the payment was a "forced contribution." Again the purchase price for the license to use the streets could not be paid in a gross sum. (*Beekman* v. *Third Avenue R. R. Co.*, 153 N. Y. 144, 158.) It must be by annual payments and graded by the receipts or earning power of the company. These payments went into the city treasury, where all money of the city must be paid (Charter of the City of Buffalo [Laws of 1891, chap. 105], §§ 59, 64) and applied to reduce tax levies.

The fact that the money paid is remuneration for something acquired is not incompatible with the proposition that it also may be "in the nature of a tax." So far as it is the purchase price denuded of any of the other attributes which the statute imports into it we may say it is not in the nature of a tax. When, however, we come to consider that the payments must be made to enable the defendant to do business, that it must be paid in yearly percentages of its revenues and goes to swell the annual budget of the city, we conclude that it has the *indicia* of a tax, even though it be also a compensation for property acquired. The tax which a

stock corporation pays for the privilege of doing business is based upon its capital stock and is the compensation which it pays for that privilege. It has the attribute of a tax as well as that of compensation. Whatever may be the condition imposed for the privilege of doing business — whether designated a bonus, compensation, a license fee or in name a tax — it is in effect a tax. (Burroughs Tax. § 131; *Gordon* v. *Appeal Tax Court*, 3 How. [U. S.] 133; *Home Ins. Co.* v. *New York State*, 134 U. S. 594; *Chicago General Railway Co.* v. *City of Chicago*, 176 Ill. 253.)

The imposition of a percentage charge for the privilege of doing business has been treated as the levying of a tax contribution. In *Maine* v. *Grand Trunk Railway Company* (142 U. S. 217) the State of Maine had imposed upon railroad companies what it denominated "an annual excise tax for the privilege of exercising its franchises in this State." The tax was based upon the "gross transportation receipts" and was in lieu of all other taxes. The court in commenting upon the authority to make this exaction say (at p. 228): "It (the State) may require the payment into its treasury, each year, of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years. The character of the tax or its validity is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation, is open to the consideration of the State in determining what may be justly exacted for the privilege. The rule of apportioning the charge to the receipts of the business would seem to be eminently reasonable, and likely to produce the most satisfactory results, both to the State and the corporation taxed." It is of no significance to say that in the case cited this is designated a tax. The essence of the charge is that it was an annual impost which the railroad company was called upon to pay in the way of percentages for the privilege of doing business. That is the characteristic feature of every percentage imposition. Judge Cooley, in his Constitutional Limitations (6th ed. p. 611), uses this language: "Every burden which the State imposes upon its citizens with a view to a revenue, either for itself or for any of the municipal governments, or for the support

of the governmental machinery in any of the political divisions, is levied under the power of taxation, whether imposed under the name of tax, or under some other designation. * * * It is not uncommon, as we have already stated, to require that corporations shall pay a certain sum annually, assessed according to the amount or value of their capital stock or some other standard; this mode being regarded by the State as most convenient and suitable for the taxation of such organizations."

Nor do we think the Milburn agreement so changed the relations of the defendant toward the city in its payment of the percentages which it provided for as to affect the question under consideration. The report of the committee is pervaded with the understanding that the agreement which it recommended was to be a substitute for the existing relations of the companies and the city. This same understanding is embodied in the agreement itself. One sentence which is in harmony with the whole text of the agreement reads: "The intention of the parties is to substitute for the percentages of their gross receipts agreed to be paid as aforesaid by the Crosstown and West Side Companies the percentages herein fixed of the gross receipts of all three companies, and thereby insure the operation of the entire system of street railroads without any preference of any part thereof over any other part."

When we turn to the language of section 46 of the Tax Law (*supra*), considered in conjunction with existing conditions, we find it expressive of an intent to allow deductions of this kind. The payment is to be abated if paid to the city: 1. "Under any agreement therefor." Since 1892 the authority for the payments has been the Milburn agreement. 2. "Under any statute requiring the same." The original warrant of authority was the mandate of the Legislature, and the agreement itself has been ratified by that body. 3. "Any sum based upon a percentage of gross earnings, or any other income." The foundation of these payments is by percentages upon gross earnings. The Legislature, however, in its care to avoid any burden savoring of a double tax, extended the deduction to be made to a percentage upon any income. 4. "Or any license fee." It may be as suggested in the brief of the counsel for the appellants that some companies paid certain fees for the use of cars and hence this exemption. The franchise granted is of the

character of a license, and this expression is used interchangeably with "consent" in section 1 of chapter 65 of the Laws of 1886 (as amd. by Laws of 1886, chap. 642 and Laws of 1889, chap. 564.) 5. "Or any sum of money on account of such special franchise." Following the specific enumerations of the various payments on account of which deductions are to be made is this *omnium gatherum* clause, indicating the breadth of purpose of the Legislature to include within the category every conceivable payment of the general quality to which the section relates. The payment must, however, have been "in the nature of a tax." Not generically or *sub nomine* a tax, but embodying the characteristics which inhere in every tax payment. The language of the whole section is designedly comprehensive to cover every possible payment for a street franchise accruing to a city and which partakes of the characteristics of a tax. As already suggested, the crucial attributes of a tax are that it is a toll upon property without the consent of the owner, and the money secured is to be applied toward governmental expenses of the body politic for whose benefit the imposition is to be made. These two characteristics are manifestly paramount in the percentage payments which the defendant has made to the city as well under the statutes as under the Milburn agreement.

The various acts delegating to the municipality the right to dispose of the privilege of using the streets for the operation of street railroads contained as one of the chief constituents the furnishing of a revenue to the city. In *Beekman* v. *Third Avenue R. R. Co.* (*supra*), after reciting succinctly the fact that the statute requires the franchise to be sold to the bidder agreeing to pay the largest yearly percentage, the court add, at page 153: "The purpose evidently was to secure to the city the largest revenue that would be consistent with the public convenience and the public interest."

With these revenues accruing in fact based upon percentages or agreements inuring to the monetary benefit of the city, the Legislature passed the Special Franchise Tax Law as another revenue producer to the city. The act is akin to the previous legislation in that it imposed a burden upon the privilege of constructing or operating railroads in the streets. In the previous acts the payment of revenues to the city must have been upon the assumption that the right possessed value and earning power, the usual concomitants of

property. In the Special Franchise Tax Law it was made *taxable* property by fiat of the Legislature and was classified as real estate and directed to be placed upon the assessment roll like other taxable property. The mandate of the Legislature did not create this property, it merely required it to be placed upon the assessment roll. It took property then contributing to the revenues of the city and comprehensively provided a system for its assessment. It, however, was careful to provide for giving credit to the property owner for payments made to the treasury of the city. When we consider the course of this legislation relative to the gradual growth of the sentiment that a street franchise is properly amenable in some way to taxation and culminating in the Special Franchise Tax Law, the meaning of the language, allowing for deductions, must lead to the conclusion that it embraces the percentage payments made by the defendant. Language so carefully chosen, and so obviously with reference to existing situations, was not used by accident. It should receive a fairly liberal construction, and the intention of the Legislature be followed as far as it can be ascertained.

It is a matter of current history that the act was passed at an extraordinary session of the Legislature convened for the sole purpose of reconsidering a similar effort which had been passed at a regular session but had not received the approval of Governor Roosevelt. In the message convening the Legislature the Governor expressly advised amending the proposed legislation by allowing for deductions by reason of percentages on the gross earnings of the companies about to be taxed. The Legislature gave heed to this suggestion and passed the act so as to add section 46 to the Tax Law in the way it now appears. While not in any sense conclusive upon the legislative intent, yet, taken in connection with the trend of the entire legislation upon the subject, it tends to clarify the legislative purpose if any elucidation were necessary.

The counsel for the respondent contends that the Milburn agreement is founded on a good consideration and that the payments of the percentages pursuant thereto were voluntarily made and accordingly were not in any sense a tax. The essence of every agreement is a good consideration and that it expresses the engagement of the contracting parties freely assumed. Yet section 46 of the Tax Law (*supra*), in terms allows deductions to be made for any sum paid

"under any agreement therefor," implying that even though the percentages may be paid conformably to an agreement they may still be in the nature of a tax. In all the acts providing for a sale of the consent of the local authorities for the use of the street privilege an agreement was essential. The unique language "in the nature of a tax" was probably adopted so that it could not be claimed that because the payments made may not have contained all the attributes of a tax, still they would come within the purview of the exemption allowed.

The important distinction to be kept in mind in this case is that the city of Buffalo had no franchises to sell except as it was derived from the sovereign power. (*Beekman* v. *Third Avenue R. R. Co.*, 153 N. Y. 144, 152.) The salable or merchantable value was imparted to it by the Legislature. In prescribing the limited authority to sell the Legislature required that payment for the privilege must be by a percentage of the gross earnings of the company purchasing. Subsequently the State in the exercise of its dominant authority and for the benefit of the localities characterized this franchise as taxable property. In order to obviate the payment of a double tax it required the municipal authorities to give credit to the corporation for whatever it was already liable to contribute annually by its percentages toward the expenses of the city. Before the right to sell the consent of the municipal authorities to a street surface railroad company had been conferred many companies had acquired the privilege gratuitously. One company enjoying the privilege was taxed a yearly sum therefor while its competitor suffered no diminution of its earnings for that license. One was paying a large rate, another a minimum percentage. The system of deductions was designed in a measure to equalize this disparity. If any company had paid a gross sum for the franchise it was not practical to carry the process of equalization to an allowance or return of any part of the purchase price so paid. The Legislature, realizing that payments by percentages were generally prevalent throughout the State, and for years had been the one system permissible, adopted the only feasible method of adjusting the inequalities which had grown out of the legislation on the subject. To equalize the tax burden is the pith of any tax law. (Cooley Const. Lim. [6th ed.] 607.)

Very naturally much ingenuity has been manifested to discover what deductions were intended by said section 46 unless the interpretation here given is to prevail. The proposition is confidently asserted that it is entirely consistent to hold that the Legislature intended that a lamp tax, license fees and taxes for the maintenance of the police and health departments were intended to be covered by this language providing for percentage deductions. The lamp tax of the city of Buffalo is levied pursuant to section 414 of chapter 105 of the Laws of 1891, which is the city charter. One-half of this charge is payable out of the general fund. The other half is apportioned upon the taxable property of the taxing district, and goes upon the assessment roll in a separate column headed "lamp-tax." There is no provision in the Special Franchise Tax Law permitting the deduction of this tax. The taxes for the support of the city departments are in name as well as in fact taxes. The license fee is specifically enumerated in section 46. Not one of these tax items is a payment by percentages either by virtue of any agreement or pursuant to any statute. The peculiar language of the section pertinent to the system of percentages prevailing can hardly be tortured into referring to taxes pure and simple, and which are directly levied. The Legislature did not reconvene and re-enact this tax law with this important section engrafted in it without a purpose. It was intended to meet and adjust and harmonize the varying conditions existing. If it was framed to allow deductions for specific taxes, which are an ordinary municipal charge, a few plain words would have been all sufficient. In fact, the only deductions allowed, so far as I am able to perceive, are those by percentages. These corporations are charged with the payment of ordinary municipal taxes upon their franchises, the same as any other taxpayer of the city upon his assessable property.

A few other objections may be noted. It is insisted that the Legislature did not intend to grant the right to the municipality to sell the franchise and then, after its exercise, take away the benefits of the sale. This is hardly a judicial statement of the action of the Legislature. It did permit a sale to be made for the benefit of the city, the revenues to be paid in a certain way. It then extended the benefits accruing to the city by the Special Franchise Tax Law,

imposing as a condition that the lesser benefits delegated be surrendered or merged in the greater. It is also claimed that when the Milburn agreement was entered into that the defendant might as well have agreed to pay five or seven per cent of its earnings as the lesser rate, if all aré to be deducted from the tax now charged. Along the same line much is said as to the sale to the highest bidder being unnecessary if the whole percentage imposed is to be deducted. The fallacy of this position must be apparent when we consider that the Milburn agreement and all the other statutes imposing percentages were in force long prior to the enactment of the Special Franchise Tax Law, and the Legislature could not forecast the passage of that act. That law simply took hold of the situation then existing.

Nor is the franchise property of the city of the same character as tangible property which it may own. Its title coming from the sovereign power is for a special restricted purpose and not the unqualified ownership usually attaching to property.

The record before us does not show that the "great street surface railroad corporations of the cities of New York and Brooklyn were required to pay a certain percentage * * * amounting annually to many thousands of dollars." We may assume, however, that the statement is correct. It is fair also to indulge the correlative proposition that each of these corporations is called upon to pay a far greater sum into the coffers of the city by reason of increased taxes laid upon it pursuant to the Special Franchise Tax Law.

Again it is stated that by an amendment of section 34 of the Rapid Transit Act (Laws of 1891, chap. 4, added by Laws of 1894, chap. 752, and amd. by Laws of 1900, chap. 616), passed since the Special Franchise Tax Law, a large percentage is imposed. By section 37 of that act (added by Laws of 1894, chap. 752, and amd. by Laws of 1895, chap. 519) the city of New York is authorized to issue bonds to provide moneys for the construction of the road. The rental required to be paid by section 34 of the act (*supra*) consisting, except as therein stated, of a sum equal to the annual interest upon the bonds and one per cent percentage on the amount of the bonds are to be applied toward the payment of the interest on these bonds and the balance is to go into a sinking fund for the purpose of meeting this obligation. The act itself fixes the status of these

percentage payments, and they are probably not within the compass of section 46 of the Tax Law (*supra*). Therein lies the clear distinction between percentages paid for general purposes and those for a specific purpose which arise solely by reason of the expenditures created by the act requiring their payment. In the one general taxation is lightened by the payments and in the other no such benefit accrues. It is also to be noted that the act of 1900 does not regulate this percentage upon the income or revenue of the company, but upon certain bonds issued by the city, and which it is expected the railroads or construction company will pay as an obligation against it.

From our view of section 46 of the Tax Law (*supra*) it is unnecessary for us to enter into a discussion of the grammatical construction of its language as has been done by the counsel for the appellants. Suffice it to say that we do not concur with the analysis made. The payment referred to, we think, unmistakably relates back to the predicate of the sentence, and includes every sum to be deducted. As was said by the Court of Appeals in *People ex rel. Met. St. Ry. Co.* v. *Tax Comrs.* (174 N. Y. 438): "It commanded that all sums, in the nature of a tax, paid by the owner of a special franchise to a municipality for its exclusive use, should be deducted from the tax imposed for local purposes."

The valuation of the franchise of the defendant made by the State Board of Tax Commissioners and the statement thereof filed with the city clerk was in a gross sum. It was placed upon the annual assessment roll of the twentieth ward of the city as an indivisible sum. The principal office of the defendant was in that ward. The contention of the appellants is that the assessment was void because not divided or apportioned among the various wards or tax districts of the city. We find nothing in section 42 of the Tax Law (*supra*) requiring this apportionment to be made. The tax receipts are payable to the city treasurer, and the deductions are a gross sum which by the statute imposing them are to be paid to the city treasurer. This is further confirmed by the Milburn agreement which provides that the gross receipts or percentages are "to be deemed a single, indivisible sum." The assessors of the city are elected on the general tickets, and comprise the board for the entire city (City Charter [*supra*], §§ 129–136, as amd. by Laws of 1895, chap. 805), and that constitutes their tax district. The Tax Law (Laws of 1896,

chap. 908, § 2, subd. 1) defines a tax district as follows: "'Tax district' as used in this chapter, means a political subdivision of the State having a board of assessors authorized to assess property therein for State and county taxes."

Section 42 of the Tax Law (*supra*) requires the city clerk to deliver a certified copy of the statement filed with him "to the assessors or other officers charged with the duty of making local assessments in each tax district in said city." He was, therefore, required to deliver a copy of the statement to the board of assessors and to no one else, and this was the authority for the assessors to spread the assessment upon the roll.

Nor do we subscribe to the contention of the appellants that the imposition of the tax for the benefit of the city by the Special Franchise Tax Law is violative of the Milburn agreement. By the statutes in force at the time of the making of that agreement the defendant was obliged to pay certain sums to the city by way of percentages. The burden which it undertook by virtue of that agreement was in substitution of the percentages imposed by statute. There is nothing in the agreement indicating an intention to relieve the defendant from any tax which the Legislature might impress upon its property.

We think the court erred in not allowing to be applied in reduction of its tax levied under the Special Franchise Tax Law the said sum which it had paid into the city treasury for percentages accruing to the city in pursuance of the Milburn agreement. For that error the judgment should be reversed and a new trial granted, with costs to the appellants to abide the event.

WILLIAMS and STOVER, JJ., concurred; McLENNAN, P. J., dissented in opinion, in which HISCOCK, J., concurred.

McLENNAN, P. J. (dissenting):

The material facts of this case are not in dispute, but are such as to make it necessary to determine the true meaning of section 46 of the Tax Law (Laws of 1896, chap. 908), added by chapter 712 of the Laws of 1899, known as the "Special Franchise Tax Law."

I concur in the conclusion reached by the majority of the court upon the questions presented by this appeal, except as to the mean-

ing of and the effect which should be given to the section of the statute referred to, which involves the question: Is a street surface railroad corporation, organized under the laws of this State, entitled to be credited upon the tax assessed against it in any year under the "Special Franchise Tax Law," with the amount which it may have paid the previous year to the municipality in which its road is located, under and by virtue of the bid which it made or the agreement which it entered into as a condition of obtaining its franchise from such municipality?

The majority of the court are of the opinion that the amount thus paid by the corporation should be so credited, because such "payment was in the nature of a tax," within the meaning of section 46 of the Tax Law (*supra*). That section provides as follows: "If, when the tax assessed on any special franchise is due and payable under the provisions of law applicable to the city, town or village in which the tangible property is located, it shall appear that the * * * corporation affected has paid to such city, town or village for its exclusive use within the next preceding year, under any agreement therefor, or under any statute requiring the same, any sum based upon a percentage of gross earnings, or any other income, or any license fee, or any sum of money on account of such special franchise, granted to or possessed by such * * * corporation, which payment was in the nature of a tax, all amounts so paid for the exclusive use of such city, town or village * * * shall be deducted from any tax based on the assessment made by the State Board of Tax Commissioners for city, town or village purposes, but not otherwise; and the remainder shall be the tax on such special franchise payable for city, town or village purposes."

The defendant, Crosstown Street Railway Company of Buffalo, is a street surface railroad corporation. It was organized about the month of February, 1890, under and pursuant to chapter 252 of the Laws of 1884, as amended. Section 7 of that act provided, in substance, that the local authorities of any incorporated city or village of the State might, at their option, sell at public auction the "franchise" to construct, maintain and operate a street surface railroad upon any street, road, avenue or highway of such city or village. Section 8 required that in cities having a population of 250,000 or more (which included the city of Buffalo), the corporation obtaining such

franchise "shall, for and during the first five years after the commencement of the operation of any portion of its railroad, annually, on the first day of November, pay into the treasury of said respective cities in which its road is located, to the credit of the sinking fund thereof, three per cent of its gross receipts for and during the year ending the next preceding thirtieth day of September, and after the expiration of said five years, make a like annual payment into the treasury of said respective cities, for the credit of said sinking funds, of five per cent instead of three per cent of said gross receipts. * * * In any other incorporated city or village the local authorities shall have the right to require, as a condition to their consent, * * * the payment annually of such percentage of gross receipts, not exceeding three per cent, into the treasury of said city or village, as they may deem proper."

Under the provisions of that statute any incorporated city or village, not having a population of 250,000, was authorized to sell at public auction a "franchise" for a gross sum to be paid in cash by the corporation purchasing the same; and on the same day to sell another "franchise" to a different corporation, and require it to pay annually a certain percentage of its gross yearly receipts. The two franchises might be substantially equal in value, and the purchase price or the sum bid for each might be practically the same, but in one case the purchase price was required to be paid at once and in cash, and in the other the obligation of the corporation to pay a certain percentage of its gross receipts each year during its corporate existence was accepted in payment in lieu of a gross sum. Under that act it would have been entirely competent for the city of Buffalo to have sold such "franchise" to a railroad corporation for a gross cash sum, in addition to the percentages specified in the statute, and at the same time to have sold another "franchise" to a different corporation for a percentage of its gross receipts, in addition to the percentages of such receipts required by the statute to be paid by the purchaser of such franchise. Section 7 of said statute was repealed by chapter 65 of the Laws of 1886.

Section 1 of chapter 65 of the Laws of 1886 imposed the obligation upon all incorporated cities and villages to sell such franchise "at public auction to the bidder who will give the largest percentage per annum of the gross receipts derived from the operation of

said railroad or railway, with adequate security as hereinafter provided for the payment of such percentage, provided that in cities having a population of two hundred and fifty thousand or more, such percentage shall in no case be less than three per centum per annum of such gross receipts, for and during the period of the first five years of the operation of any portion of said railroad or railway, and five per centum per annum of such gross receipts after the expiration of five years."

That act was amended by chapter 642 of the Laws of 1886, but its requirements were not materially changed in any respect important to note, except that by an amendment of section 2 thereof its provisions did not, except in an immaterial instance, "apply to companies now organized or hereafter to be organized for the purpose of building elevated railroads in counties having less than one million inhabitants, nor to street surface railroad companies heretofore organized in cities or villages of less than forty thousand inhabitants."

Section 1 of the statute, as amended, prescribed with great detail the manner in which the sale of such franchises must be made and how advertised, and provides: "The comptroller or other chief fiscal officer of the cities, and the president of the board of trustees in villages, shall attend and conduct the sale * * * and may cancel the bid if the bidder shall not furnish satisfactory security, and sell the said consent and license in the same manner as above provided."

Section 1 of chapter 65 of the Laws of 1886, as amended by chapter 642 of the Laws of 1886, was again amended by chapter 564 of the Laws of 1889, but none of the provisions involved in this controversy were changed by such amendment.

In 1890 the "Railroad Law" was passed, being chapter 565 of the Laws of 1890. Section 91 of that act provides that a street surface railroad shall not be built or operated upon the streets of a city until the consent of the municipal authorities is obtained. Section 93 provides that the consent of the municipal authorities in cities containing 90,000 inhabitants or over must contain the provision "that the right, franchise and privilege of using any street * * * shall be sold at public auction to the bidder who will agree to give the city the largest percentage per annum of the gross receipts of

such corporation, with a bond or undertaking in such form or amount and with such conditions * * * for the fulfillment of such agreement. * * *" Provision is also made for giving notice of or advertising such sale.

Section 95 provides: "Every corporation building or operating a railroad, constructed or extended under the provisions of this article, or of chapter two hundred and fifty-two of the laws of eighteen hundred and eighty-four, within any city of this State having a population of two hundred and fifty thousand or more, shall, for and during the first five years * * * annually * * * pay into the treasury of the city in which its road is located, to the credit of the sinking fund thereof, three per cent of its gross receipts, * * * and after the expiration of such five years * * * five per cent of the gross receipts."

It will be seen that, as applied to the city of Buffalo, the statute of 1890 practically re-enacted chapter 65 of the Laws of 1886, as amended, and required a franchise, in that city, like the one in question, to be sold at public auction to the highest bidder, and that in that event the corporation purchasing the same was required to pay to the city the three and five per cent (as the case might be) upon its gross receipts specified in the statute of 1886.

The whole subject of the compensation which corporations should be required to pay to municipalities for franchises of the character here involved, was again considered by the Legislature in the year 1892, with the result that chapter 676 of the Laws of 1892 was enacted, which was an amendment of "The Railroad Law" of 1890. Section 180 of the law of 1890 repealed chapter 252 of the Laws of 1884, section 1 of chapter 65 of the Laws of 1886, chapter 642 of the Laws of 1886, and also chapter 564 of the Laws of 1889. So that "The Railroad Law" of 1890, as amended in 1892, contained the only statutory provisions relating to the compensation which was or might be required to be paid by a railroad corporation to a municipality for the right or franchise to construct and operate a railroad upon its streets or avenues. Section 90 of "The Railroad Law," as amended in 1892, provides: "A corporation organized since May 6, 1884 (the defendant railway company was organized in 1890), for the purpose of building and operating or extending a street surface railroad * * * upon and along any street,

avenue, road or highway in any city, town or village, * * * must comply with the provisions of this article."

Section 91 provides: "Such railroad shall not be built, extended or operated unless * * * the consent of the local authorities * * * shall have been first obtained."

Section 93 provides: "The consent of the local authorities in cities containing twelve hundred and fifty thousand inhabitants * * * must contain the condition that the right, franchise and privilege * * * shall be sold at public auction to the bidder who will agree to give the city the largest percentage per annum of the gross receipts of such corporation, with a bond or undertaking * * *."

It is further provided in such section as follows: "Nothing herein contained shall be construed as applying to or affecting or modifying the terms of a certain contract bearing date January 1, 1892, entered into by and between the city of Buffalo and the various street surface railroad corporations therein named in such contract." Which is the Milburn agreement, and will be referred to later.

Section 95 provides that every corporation building or operating such a railroad under that act or the statute of 1884, in cities having a population of 1,200,000 or more, shall pay to such city three or five per cent of its gross receipts, as the case may be, substantially as provided by section 1 of chapter 65 of the Laws of 1886, as amended. The section further provides as follows: "In any other incorporated city or village (having a population of less than one million two hundred thousand) the local authorities shall have the right to require, as a condition to their consent to the construction, operation or extension of a railroad under the provisions of this article, the payment annually of such percentage of gross receipts, not exceeding three per cent, into the treasury of the city or village, as they may deem proper. * * *"

The law of 1892 is the last material enactment of the Legislature bearing upon the subject. We have now as far as necessary called attention to the various statutes relating to the authority of municipalities to sell the right, franchise or privilege to construct and operate street surface railroads upon the streets and avenues of such municipalities, from the year 1884, when chapter 252 of the Laws of 1884, under which the defendant railway company was organized,

to the present time, and it will be observed that while there have been numerous changes in the law, few of them have affected the city of Buffalo, and none of them the appellant railway company.

To recapitulate: Under the act of 1884 the city of Buffalo might, at its option, sell at public auction the "franchise" but, whether or not it was so sold, the corporation obtaining the same was required to pay annually therefor three or five per cent (as the case might be) of its gross receipts into the treasury of such city for the credit of the sinking fund. By section 1 of chapter 65 of the Laws of 1886, as amended by chapter 642 of the Laws of 1886 and chapter 564 of the Laws of 1889, it was made mandatory upon the city of Buffalo to sell the "franchise" at public auction to the highest bidder, and the corporation bidding the same was required to pay the percentage fixed by the act of 1884 in addition to the amount of its bid. "The Railroad Law," being chapter 565 of the Laws of 1890, did not affect the city of Buffalo or a corporation obtaining a franchise to construct and operate a railroad upon the streets of that city. Under section 95 of "The Railroad Law," as amended in 1892, the city of Buffalo still had the right to require, as a condition of granting a "franchise," "the payment annually of such percentage of gross receipts, not exceeding three per cent, into the treasury of the city * * * as they may deem proper;" but besides, as we have seen, it was expressly provided by section 93 that none of the provisions of the article should affect the obligation assumed by the appellant railway company under the contract which it entered into with the city of Buffalo, known as the "Milburn agreement."

In this connection it may be observed that the Legislature, ever since the year of 1884, and after, as well as before, the passage of the "Special Franchise Tax Law" in 1899, required or authorized the incorporated cities and villages of the State, including the city of Buffalo, to sell a "franchise" to the highest bidder, a corporation bidding the highest percentage of its gross annual receipts therefor; and in no event, at the option of said municipality, to be less than three per cent of such gross receipts. In other words, there has been no time since the passage of the act in 1884, under which the appellant railway company was incorporated, when it could not have been required to pay at least three per cent of its gross annual receipts for the franchise granted to it.

Prior to the month of February, 1890, one of the street railway companies of the city of Buffalo, under and pursuant to chapter 65 of the Laws of 1886, as amended, made application to the city of Buffalo for a franchise to construct, maintain and operate a street surface railroad upon certain streets and avenues in said city. All the provisions required by statute having been complied with, on or about the 6th day of February, 1890, the city of Buffalo sold such franchise at public auction to appellant railway company, at its bid of eleven and three-fourths per cent of its gross annual receipts, payable annually, in addition to the three or five per cent required to be paid under section 1 of chapter 65 of the Laws of 1886, as amended. The appellant railway company being the highest bidder, such franchise was struck off or sold to it at the price bid, and such railway company thereupon executed to the city of Buffalo a bond or undertaking in the penal sum of $200,000, conditioned for the payment by it of the percentage bid by it, and for the faithful performance of other conditions imposed upon it by the purchase of such franchise. Immediately thereafter the appellant railway company having executed the undertaking required, which was duly approved by the city, entered upon the construction of its railroad, completed it and has ever since been engaged in operating the same.

Before and after the defendant railway company had obtained the franchise from the city of Buffalo to construct and operate its railroad in certain streets of said city in the manner above indicated, other corporations, to wit, the West Side Street Railway Company and the Buffalo Railway Company, had obtained franchises from said city, authorizing them respectively to construct and operate their railroads upon other streets of said city. The Buffalo Railway Company was under no obligation to pay anything to said city of Buffalo for its franchise, and had a right to charge a transfer fare of three cents for each passenger transferred from the cars of one of its lines to those of another. The appellant railway company charges a full fare of five cents for each passenger riding over any of its lines, whether transferred or not to another line. The West Side Street Railway Company had agreed, upon the purchase of its franchise, to pay thirty-six and one-sixteenth per cent of its gross receipts in consideration of the "franchise" granted to it. Other conditions existed which authorized said companies to exercise such

rights or privileges as rendered the street surface railroad service of the city of Buffalo unsatisfactory. Thereupon the said three corporations, to wit, the appellant railway company, the Buffalo Railway Company and the West Side Street Railway Company, entered into negotiations with the city of Buffalo looking to a readjustment of the percentages which they had respectively agreed to pay, and a modification of their rights and privileges. Such negotiations resulted in an agreement by which all transfer charges or double fares were abolished, and certain other things specified in said agreement by said companies were to be done and performed, which were regarded as beneficial to the city of Buffalo and its inhabitants. In consideration of the covenants and agreements on the part of such railway companies, the city of Buffalo consented that they should be relieved from paying the percentages which they had respectively agreed to pay, and from certain other obligations which they had assumed, and in lieu thereof it was agreed (so far as is important to note) that such companies should pay annually to the city of Buffalo two and one-half per cent of their gross receipts for the payment of the total amount of which each of said companies became jointly and severally liable. Such agreement, which is called the "Milburn agreement" in the record, was ratified by act of the Legislature, being chapter 151 of the Laws of 1892, and thereupon concededly became binding upon all the parties to it. Under said agreement the appellant railway company became liable to pay to the city of Buffalo for the year ending June 30, 1900, $13,480.45, being two and one-half per cent of its gross receipts for that year, and it actually paid into the city treasury that sum.

Under the "Special Franchise Tax Law" (Laws of 1899, chap. 712) the State Board of Tax Commissioners determined the value of the special franchise of the appellant railway company to be $2,455,735 for the purposes of taxation for the fiscal year 1900–1901. Certiorari proceedings were instituted by the appellant, and resulted in a determination that its franchise was only of the value of $1,719,014, and it was finally adjudged to be that amount. Upon such valuation there was duly assessed against the appellant railway company, as and for its franchise tax, payable to the city of Buffalo, the sum of $29,463.33. There was added to that sum $1,854.70 as a lamp tax, imposed under the provisions of title 19 of chapter 105

of the Laws of 1891, being the charter of the city of Buffalo, as amended, so that the total amount of the tax imposed upon the appellant railway company, payable to the city of Buffalo upon the valuation of its franchise, was $31,318.03. Before the commencement of this action the appellant railway company tendered to the city of Buffalo that amount, less the sum of $13,480.45, which it had paid pursuant to the terms of the Milburn agreement, to wit, the sum of $17,837.58. The city of Buffalo refused to accept such sum in payment of the franchise tax assessed against the appellant railway company; thereupon this action was brought to recover the amount. The judgment appealed from decreed that the city was entitled to recover the full amount of such franchise tax, together with the percentages imposed by section 76 of the charter (as amd. by Laws of 1898, chap. 313) because of the non-payment of the same when due, and determined that the appellant railway company was not entitled to offset, as against such sum, the $13,480.45 which it had paid the previous year under the Milburn agreement. In other words, it was held that the $13,480.45 so paid was not in the nature of a tax, and, therefore, that the appellant railway company was not entitled to be credited with that amount upon its franchise tax. Thus the question is squarely presented, whether or not the appellant railway company is entitled to credit for the sum which it paid, pursuant to its agreement, for the purchase of the franchise obtained by it, as against the amount assessed against it under the "Special Franchise Tax Law," upon the ground that the percentage of its gross receipts which it agreed to pay upon the purchase of such franchise "was in the nature of a tax."

It must be admitted that the $13,480.45 paid by the appellant railway company, under and pursuant to the terms of the Milburn agreement, was in lieu of the amount which said company had obligated itself to pay upon the purchase of the franchise in question. It seems to me that the amount so agreed to be paid was in no sense a tax or "in the nature of a tax," but that it was the purchase price of the franchise obtained from the city of Buffalo. Such a franchise is property (*People* v. *O'Brien*, 111 N. Y. 1), and by the express provision of the "Special Franchise Tax Law" is made real property; so that by the provisions of chapter 65 of the Laws of 1886, as amended, the city of Buffalo was authorized to sell "property" to

the corporation bidding the highest price therefor, and it was charged with the duty of seeing to it that it obtained therefor the largest possible price. The appellant railway company, upon the sale of such property, was the highest bidder. It agreed, in consideration of the sale to it of such property, to pay annually a certain per cent of its gross receipts. The bid made by it was voluntary. Others were bidding in competition, all seeking to obtain the thing offered for sale at the lowest price.

Under certain statutes the Legislature authorized the city of Buffalo to sell a "franchise." Under other statutes or the common law it had the right to sell other property which it owned or possessed. The purchase price of either represented the value of the thing sold, and had none of the characteristics of a tax. If the city of Buffalo is the owner of and has the right to sell a plot of ground, and sells it at public auction, can it be said that the sum bid for it, the purchase price, is "in the nature of a tax?" The city of Buffalo was authorized — and not only authorized but required — to sell at public auction its consent to construct and operate a railroad upon certain of its streets. Such consent was advertised and was offered for sale in accordance with the provisions of the statute. Upon such sale the appellant railway company bid a certain percentage of its gross earnings for the consent thus offered. The amount which it bid was the purchase price of the thing sold, and was in no sense a tax or "in the nature of a tax," but was the purchase price, pure and simple, of the property which the appellant railway company obtained. The circumstance that the price bid was based upon gross receipts, or was to be determined in some other way, rather than a gross sum, cannot change the character of the transaction. In either event it was the purchase price.

Independent of the general proposition, it is proper to ascertain, if possible, the legislative intent in enacting the statute in question. Notwithstanding the language, if it clearly appears that the Legislature intended to relieve street surface railroad companies from paying to municipalities the amount which they agreed to pay when they obtained their respective franchises, in case the amount was based upon gross receipts, by crediting the same upon the tax imposed upon their respective franchises, under chapter 712 of the Laws of 1899, then such corporations should be credited with the

amounts so paid by them. We think, however, that such was not the intent of the Legislature, and that a contrary intention is clearly manifested. In the first place, it is hardly conceivable that the Legislature intended to relieve a corporation from the payment of the amount which it agreed to pay for its franchise, if such amount was based upon percentages of its gross receipts in any previous year, and that a corporation which had paid a gross sum in cash in the same year for a like franchise should have no relief or credit.

Again, it would seem to be unreasonable that the Legislature should have required a municipality to sell a "franchise" at public auction to the highest bidder, impose upon it the duty of obtaining the highest price possible therefor, and then enact that the purchase price should, in any event, be credited to the purchaser upon a tax subsequently imposed by statute. In the case at bar the city of Buffalo presumably obtained for the franchise sold to the appellant railway company the best possible price, as it was required to do under the statute, which was two and one-half per cent of its gross annual receipts; but, according to the appellant railway company's contention, the city would have been quite as well off if it had sold the franchise for one dollar, payable annually, instead of $13,480.45, because in one case there would have to be deducted from the franchise tax only one dollar, and in the other the sum of $13,480.45. In other words, if the contention of the appellant is to prevail, it was entirely immaterial to the municipality whether the "franchise" sold for little or much, so long as the purchase price was less than the amount of the franchise tax.

In the case at bar, as we have seen, the appellant railway company obligated itself, under the Milburn agreement, to pay two and one-half per cent of its gross receipts annually to the city of Buffalo. As appears by the record, that percentage was agreed upon after much negotiation, and after the municipality had done its best to obtain a larger amount, and the appellant railway company had used its best efforts to make the percentage as small as possible. Yet, if the contention of the appellant is to prevail, there need have been no controversy between the contracting parties as to the amount of the percentages. The appellant railway company might just as well have agreed to pay five or seven per cent of its gross receipts, because the full amount of such percentages would have

been credited upon the tax imposed by the "Special Franchise Tax Law." If such is the construction, meaning and intent of section 46 of the Tax Law (*supra*), why should a corporation bidding for a franchise haggle about the amount of the percentages to be paid by it, if the amount of such percentages is, in any event, to be credited upon its franchise tax?

Attention has been called in the prevailing opinion to a message of the Governor to the Legislature prior to the passage of the act of 1899, indicating that it was his thought that the purchase price of franchises, if payable in percentages upon receipts, should be deducted from the franchise tax; but in that connection it is important to note that the Legislature has continued to impose upon certain municipalities the duty of selling such franchises at public auction to the highest bidder.

Under the statute of 1890, as amended, any city having a population of 1,250,000 or more must sell at public auction, to the corporation bidding the greatest percentage of its gross receipts, a franchise authorizing such corporation to construct, maintain and operate a railroad upon the streets or avenues of such city. The sum so bid must be paid into the treasury of such city for its purposes. Did the Legislature intend that the sum so required to be paid should be deducted from the tax imposed upon such corporation by the Special Franchise Tax Law, or credited to it upon such tax? If so, as we have seen, it is unimportant what the amount of the bid is, because whether little or much it is to be deducted from the franchise tax assessed against such corporation.

Under the law as it stood when the appellant railway company obtained its franchise, it was competent for the local authorities of any of the cities or villages of the State, not having a population of 250,000, to sell a franchise for a gross sum payable in cash. The city of Buffalo was required by the statute to sell such franchise for a percentage upon the gross receipts of the corporation purchasing the same. Was it the intent of the Legislature that in other cities than those having a population equal to the city of Buffalo, the corporations which bought such franchises and paid cash therefor should not have relief, or be entitled to any credit because of the amount so bid by them; and that the corporations purchasing such franchises in cities having a population of 250,000 or more, and

agreeing to pay a certain percentage of their gross annual receipts therefor, should be entitled to be reimbursed annually for the total percentage or amount so agreed to be paid by them? We think such was not the legislative intent when it passed the Special Franchise Tax Law (Laws of 1899, chap. 712).

The provisions of the Special Franchise Tax Law are entirely harmonized and the course of the Legislature relating to the sale of franchises by municipalities is entirely consistent, unless it is determined that the purchase price of such franchises is "in the nature of a tax." It may be inquired what was the purpose of the language used in the statute? No better answer could be made than to say that the "lamp-tax" imposed by section 414 of the charter of the city of Buffalo is covered by it. In some cities a license fee had been imposed upon each car of a street surface railroad, and various other taxes or license fees were imposed upon such corporations, some of them as police and others as health requirements. Concededly all such taxes, license fees or what not, should be deducted from the tax imposed by the Special Franchise Tax Law, but we fail to see why or how the purchase price of a franchise should be so deducted. It seems to me a farce to require a municipality to sell a franchise at public auction, charge it with the duty of obtaining the highest possible price therefor, if it, in fact, is to make no difference to such municipality whether the price paid is little or much.

Under the law of 1892 the great street surface railroad corporations of the cities of New York and Brooklyn were required to pay a certain percentage of the gross annual receipts to the cities in which their respective railroads are located, amounting annually to many thousands of dollars. I think it was not the intention of the Legislature, when it passed the Special Franchise Tax Law, to practically relieve such railroad corporations from the payment of the percentages which they agreed to pay to such municipalities, upon obtaining their respective franchises.

Under an amendment of section 34 of the Rapid Transit Act (Laws of 1891, chap. 4, added by Laws of 1894, chap. 752, and amd. by Laws of 1900, chap. 616), passed the year following the passage of the Special Franchise Tax Law, corporations organized under that act were required to pay a very large percentage of their earn-

ings to the municipalities in which their railroads were severally located. If the section of the statute in question is to bear the construction given it by the prevailing opinion, then such corporations are entitled to have such percentages credited upon their franchise taxes. We do not believe that such was the legislative intent.

Prior to the passage of the Special Franchise Tax Law the property of the defendant railway company (and like corporations) was presumably assessed at its full value. In making such assessment not only the value of its rails, cars, buildings and lands was taken into consideration, but also its earning capacity. The assessment was supposed to represent the value of the railroad, as such, and upon such valuation the defendant paid taxes, and, in addition, it paid annually to the municipality the amount which it bid upon securing its franchise. The valuation of the defendant's railroad, as assessed under the Special Franchise Tax Law, might not be materially increased, and yet, if appellant's contention is to prevail, such corporation might be substantially relieved from taxation, because credited with the amount which it agreed to pay annually to the city for the use of certain of its streets. If such is the necessary result of the act it might properly be denominated an act for the relief of certain street railroad companies, which had agreed to pay a considerable percentage of their gross earnings to the municipality from which they obtained the right to operate their respective railroads.

The question involved in this appeal is important, and the effect of the decision will be far-reaching. If the decision about to be announced is correct, practically every street surface railroad in the State will be relieved from the payment of any and all sums which they have agreed to pay to the municipalities for their franchises, provided such amount does not exceed the special franchise tax. We cannot assent to the proposition that it was the intent of the Legislature in passing the Special Franchise Tax Law to cancel all such obligations. The effect of the decision, as announced by the majority of the court, is that the purchase price, the amount bid by any corporation, for any franchise, if less than or only equal to the tax assessed against such corporation, must be deducted therefrom, because, and solely upon the ground that, such purchase price is "in the nature of a tax." We cannot assent to such an interpretation of the law, for the reason that, as it seems to us, it is unjust

and inequitable; and, further, that it is not warranted by the plain reading of the statute, because there is no basis for the claim that the amount voluntarily bid and agreed to be paid for a franchise, for property, for the right to use the streets of a municipality, is a tax or "in the nature of a tax."

The lamp tax, amounting to $1,854.70, was a tax within the meaning of the statute referred to, and the judgment appealed from should be modified by deducting therefrom that sum, and as so modified it should be affirmed, with costs.

HISCOCK, J., concurred.

Judgment and order reversed and new trial ordered, with costs to the appellant to abide event, upon questions of law only, the facts having been examined and no error found therein.

SAMUEL GRABFELDER, Respondent, v. ALBERT G. VOSBURGH, Appellant.

Sale on credit — the time runs from the delivery of the goods — when the question of acceptance is one for the jury — oral evidence held to be incompetent where it varied a written contract.

Where an order for goods to be subsequently delivered provides that the vendee shall be given four months' credit, the term of credit dates from the delivery of the goods and not from the giving of the order.

Where it appears that the goods ordered consisted of a new and expensive brand of whisky which the agent of the vendor, who obtained the order, desired to introduce among the vendee's customers; that the sale was accompanied by a representation that the goods were of a superior quality; that the goods were not delivered until September, 1899; that the vendor's agent who visited the village in which the vendee did business about once in two months did not see the vendee on his first visit after the sale and that on his second visit, which was in December, the vendee notified him that the goods were not as they had been represented to be, it cannot be said, as a matter of law, that the retention of the goods by the vendee amounted to an unqualified acceptance thereof, but the question is one of fact for the jury.

Semble, that if the four months' term of credit had expired before the vendee notified the vendor of his refusal to accept the goods, he would, as a matter of law, be deemed guilty of an unreasonable delay in exercising his right to test the quality of the goods.

Where the written order for the goods is unqualified, evidence of a verbal agreement between the parties, whereby the vendee was to be liable to pay for only

that portion of the goods which he should succeed in selling to his customers, tends to vary the terms of the contract and is inadmissible in an action brought by the vendor to recover the purchase price of the whisky.

APPEAL by the defendant, Albert G. Vosburgh, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Wyoming on the 22d day of December, 1900, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 24th day of August, 1901, denying the defendant's motion for a new trial made upon the minutes.

M. L. Coleman, for the appellant.

John L. Woodworth, for the respondent.

SPRING, J.:

This case was submitted to the jury, but upon their failure to agree the trial court directed a verdict in favor of the plaintiff.

On the 19th day of July, 1899, the defendant gave to the agent of the plaintiff, a wholesale liquor dealer, an order for a cask of rye, the order signed by the defendant reading as follows:

"WARSAW, *July* 19, 1899.

"S. GRABFELDER & Co.,

"Louisville, Ky.

"I have this day ordered through your salesman, Mr. Alex. N. Freiberg, the following goods:

"Ship via.

"1 cask Old Consolation pure rye, $3.00.

"Terms 4 months. A. G. VOSBURG,

"Warsaw, N. Y."

It will be observed that by the terms of this order a credit is given the defendant for four months. According to this testimony the rye (twenty-five gallons) was not received by him until in the month of September. If the term of credit is to date from the delivery of the goods the action is prematurely brought, as it was commenced on December 30, 1899, and the four months had not then expired. When the court intimated his intention to direct a verdict for the plaintiff the point was raised specifically by the defendant that the action was prematurely brought. This was not

a shipping bill sent to the defendant, but it was an order signed by him for goods to be subsequently delivered, and it would seem reasonable that the time of credit was to begin at the time of the delivery of the goods, especially as the plaintiff has not furnished the date of the invoice. If so, the plaintiff's cause of action had not matured when he began suit to enforce collection.

The defendant did not purchase any particular cask of rye, but a cask out of a certain kind, and the purchase did not become effective until there was a delivery to him at Warsaw, where he was allowed to test the quality of the liquor. The order contemplated a future delivery, and if the defendant's version is correct six weeks elapsed before he received the rye. The term of credit implied an opportunity to the defendant to sell some part of the goods to enable him to obtain money to meet his obligation, and it would hardly be fair to hold that the term of credit was running along before the goods arrived. This question was sufficiently raised by the pleadings. (*Mack* v. *Burt*, 5 Hun, 28.)

The evidence shows that the defendant did not wish to purchase these goods, but the plaintiff's agent desired to introduce this brand of liquor into the village of Warsaw, representing that the liquor was of superior quality and also stating in substance that if it did not prove to be satisfactory there would be no sale. The defendant testified that the goods were of poor quality and after repeated attempts he was unable to dispose of them to his customers.

The plaintiff's selling agent was in the habit of going to Warsaw about once in two months. On his first visit after this sale he did not see the defendant. The second time he was there, which was in December, the defendant told him the goods were not as represented, and he had only been able to sell about three gallons. The trial court concluded that the retention of the goods by the defendant amounted to an unqualified acceptance and that on that account the defendant was liable. We think that, under the circumstances of this case, the court below adopted too rigid a rule. It was for the jury to say whether more than a reasonable time intervened the receipt of the goods and the notification given the plaintiff's selling agent that the goods did not meet the representations upon which they were claimed to have been purchased. That is, whether they had been actually accepted by the defendant or not.

It is to be observed as pertinent to this aspect of the case that the liquor was a new brand and above the ordinary price; that the motive influencing the taking of the order by the plaintiff's agent was to introduce it among the defendant's customers for the purpose of securing a permanent trade for it in the village of Warsaw. The defendant and his bartenders testified to the unavailing efforts they made to sell the liquor to their customers. Again, the agent came to the defendant's place of business infrequently; and in the light of these circumstances we cannot say, as matter of law, that the defendant retained the liquor unreasonably before apprising the plaintiff that it was not as represented. Ordinarily what constitutes a reasonable retention of goods for examination and inspection is a question of fact. (*Pierson* v. *Crooks*, 115 N. Y. 539, 551; *Lang* v. *Severance*, 28 N. Y. St. Repr. 532; Benjamin Sales [7th Am. ed.], § 700 *et seq.*)

If the term of credit had expired before the defendant notified the plaintiff of his declination to accept the goods, probably that would have been, as matter of law, an unreasonable delay in arriving at the decision. Where a specific term of credit is extended upon a sale of goods accompanied by the representation that they are of a superior quality or of a certain grade, the opportunity of examination should be taken advantage of before the bill becomes due. The credit implies that the conditional sale is to become absolute at least by the time of the maturity of the account.

The defendant contends that there was a verbal agreement whereby he was to sell whatever of this liquor he could to his customers and was only to be liable for the amount so sold. The order, as will be observed, is unqualified, and we are inclined to the view that the proof which the defendant sought to offer upon this branch of the case tended to vary the terms of the contract. The evidence did not establish an independent or collateral agreement.

The judgment and order should be reversed and a new trial ordered.

All concurred.

Judgment and order reversed, and new trial ordered, with costs to the appellant to abide event.

PATRICK CONNORS, as Administrator, etc., of WILLIAM CONNORS, Deceased, Appellant, v. THE GREAT NORTHERN ELEVATOR COMPANY, Respondent.

Negligence — liability, to a servant of a third person, of one who furnishes a defective appliance to be used in the work in which the servant is engaged.

A corporation owning a grain elevator and a steam shovel and other appliances used in transferring grain from vessels into the elevator had an arrangement with an association called the Lake Carriers' Association, pursuant to which, when a vessel loaded with grain came to an elevator belonging to the corporation, scoopers in the employ of the Lake Carriers' Association would remove the cargo of grain with the steam shovel and tackle. The elevator company received, for the use of its shovel and appliances, a dollar and twenty cents for each thousand bushels unloaded. It employed a man known as a shoveltender to exercise general superintendence over the steam shovel and to furnish any supplies or make any repairs necessary.

Held, that the elevator company, having for an adequate compensation undertaken to furnish the appliances for unloading the grain, assumed an obligation to the scoopers to furnish fitting appliances, and that the scoopers had a right to assume that the elevator company had performed this obligation;

That the elevator company was, therefore, liable for the damages resulting from the death of a scooper, who, while engaged in the performance of his work, was killed in consequence of the breaking of a defective rope used in connection with the steam shovel, where the result was one which might have been anticipated.

MCLENNAN, P. J., and STOVER, J., dissented.

APPEAL by the plaintiff, Patrick Connors, as administrator, etc., of William Connors, deceased, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Erie on the 6th day of December, 1902, upon the dismissal of the complaint by direction of the court after a trial at the Erie Trial Term.

Daniel J. Hanley, for the appellant.

Frank Gibbons, for the respondent.

SPRING, J.:

The plaintiff's intestate was a scooper employed by the Lake Carriers' Association in unloading grain from the boat *Thomas Maytham* into the elevator owned by the defendant, a domestic cor-

poration, in the city of Buffalo. The steam shovel and appliances used in elevating the grain were owned by the defendant. They were kept in a place accessible to the scoopers, and whenever a boat-load of grain came to an elevator belonging to the defendant in the city of Buffalo the scoopers obtained the shovel and tackle and dis-embarked its load of freight. The defendant received for the use of its shovel and appliances one dollar and twenty cents for each 1,000 bushels unloaded. It kept a man, called the monthly man, named Cavanaugh, in this instance in its employ, who was present at the unloading as its representative to furnish any supplies needed in the operation of the steam shovel and with general superintend-ence over the same. If any part of this gearing was inadequate or needed remedying this employee supplied it. As one witness put it: "I know what the duties of the shovel tender are, Cavanaugh is a monthly man and is also called a shovel tender. He was employed by the elevator company. I have seen him about work there. He would look after the leg, put the leg in and take it out again of the hold of the boat and look after the leg as it was put in and taken out and see that it was placed right. He had to see that the rigging and machinery was put up right before the scoopers started to work, they had to put it up to his satisfaction."

A heavy block of wood called the snatch block was attached to an upright or stanchion by a line used to draw the grain into the leg extending from the hold of the boat to the elevator and up which the grain was drawn. Connors, the intestate, was working in the hold of the boat in November, 1901, with about 100 other workmen unloading the grain when the rope (which was defective and insufficient) holding up this block parted and the block fell, striking Connors and causing his death. Two or three days before the accident Cavanaugh, the defendant's representative, put in this rope, when the following occurred, as testified to by the assistant boss scooper: "Just before the accident there was a snatch block on the deck and no line on it and I told Cavanaugh to put a line on it. This was a few days before the accident or a few jobs I don't know. I told him a few jobs before this one prior to this one to put a line on the block, so he says, 'All right, I will put one on,' and he went into the tower. A line something like this was lying in the tower and he started to put this on. I said, 'What are you

going to do with that?' He says, 'Put it on the snatch block.' I spoke, 'Not a line like that?' And he said, 'Yes.' I said, 'It will kill somebody if you do.' He said, 'What do you want me to do? Go and buy a line?' I says, 'All right, go ahead,' and he put it on."

The intestate was not in the employ of the defendant. The appliances, however, were furnished by it to use for the purpose of unloading the grain. Its man had charge of this business. The appliances were furnished at a specific compensation and were used as designed and intended. Is the defendant liable?

When the defendant turned over the steam shovel and its appliances to the Lake Carriers' Association to be used in unloading grain, it knew that the grain was to be taken out by a large number of scoopers. It impliedly invited these men to go into the hold of the freighter with the assurance that it had furnished appliances which rendered the performance of the work reasonably safe so far as such tackle was concerned. Its obligation to the men who did the work was to furnish fitting appliances. They had a right to assume that this had been done. The defendant, to be sure, made its agreement with the Lake Carriers' Association and there was no privity of contract between the elevator association and the plaintiff's intestate in that he was not in its employ. The liability of the defendant is not contractual in its character. (*Barrett* v. *Lake Ontario Beach Imp. Co.*, 174 N. Y. 310, 314.) It undertook to furnish appliances for a particular work, the negligent performance of which duty it knew imperilled the lives of many men. Having for an adequate compensation undertaken to furnish this tackle with full knowledge of its use, it assumed a responsibility to those who were injured while it was being operated precisely as intended.

In *Coughtry* v. *Globe Woolen Company* (56 N. Y. 124) a firm of contractors was putting a cornice on defendant's mill. The defendant's men erected a scaffold for this purpose. The plaintiff's intestate was employed by the contractors in putting up the cornice. The scaffold, by reason of its improper construction, fell while the plaintiff's intestate was at work upon it, causing his death, and the Court of Appeals reversed the judgment of the General Term, which affirmed a nonsuit. The court say (at p. 128): "It is evident from the nature and position of the structure

that death or great bodily harm to those persons would be the natural and almost inevitable consequence of negligently constructing it of defective material or insufficient strength. It was clearly the duty of the defendant and its agents to avoid that danger by the exercise of proper care. * * * This duty was independent of the obligation created by the contract. If neglected it would be no answer to the action to say that the defendant was also guilty of a breach of its contract; nor would it be any better answer to say that by the terms of the contract it was permitted so to construct the scaffold as to imperil the lives of the workmen." (See, also, *Devlin* v. *Smith*, 89 N. Y. 470, 477 *et seq.*; *Hannigan* v. *Union Warehouse Co.*, 3 App. Div. 618; affd., 157 N. Y. 711.)

It is also to be noted that the death of the plaintiff's intestate was the natural and probable result following the parting of the rope and the consequent falling of the block. The injuries were not unexpected, but were to be anticipated readily, and it was incumbent upon the defendant to protect the men against an accident which it could easily prevent.

The judgment should be reversed and a new trial granted, with costs to the appellant to abide the event.

All concurred, except McLENNAN, P. J., and STOVER, J., dissenting.

Judgment reversed and new trial ordered, with costs to the appellant to abide event.

JENNIE B. EGGLESTON, Respondent, *v.* THE TOWN OF CHAUTAUQUA, Appellant.

Negligence — injury on a defective town bridge — statement of cause of action to be served on the supervisor of a town — proof of an injury not specified in the statement held to be competent — verdict in excess of the amount alleged in the statement.

Section 16 of the Highway Law (Laws of 1890, chap. 568) provides that no action shall be brought against a town to recover damages for personal injuries resulting from a defect in a town highway or bridge existing because of the negligence of the commissioner of highways of such town, "unless a *verified statement of the cause of action* shall have been presented to the supervisor of the town within six months after the cause of action accrued."

A person who, on August 4, 1901, had sustained personal injuries upon a defective town bridge, filed a statement, alleging, among other things, "That by reason thereof the claimant was badly bruised and suffered a severe injury to her *right leg at and about the knee;* sustained a severe shock; was made sick; suffered much pain; is so far disabled that she is compelled to lie in bed and has been obliged to pay large sums of money for medical attendance and care and has been incapacitated from attending to her ordinary duties in caring for herself or deriving any benefit from her visit among her friends and acquaintances — to her great damage in the sum of one thousand dollars."

In February, 1902, the claimant commenced her action against the town, and upon the trial was permitted, over the objection of the defendant, to prove, in addition to the injuries to the right leg at and about the knee, the existence of an *intercapsular fracture*, an injury of a serious nature to the hip. The jury rendered a verdict in favor of the plaintiff for $4,500, which the court refused to reduce to $1,000, the amount stated in the statement served.

The complaint in the action was broad enough to admit proof of the injuries shown and it demanded judgment for $5,000 damages. It did not appear that at the time the plaintiff served the statement she intended to misrepresent the extent of her injuries, and she contended that she did not discover the real nature and extent of such injuries until just before the trial.

Held, that the judgment entered upon the verdict should be affirmed;

That the plaintiff, being ignorant of the real extent of her injuries when she verified the statement of the cause of action and the statement having served the object intended to be accomplished by the statute, viz., to give the town notice of the claim, such statement did not operate to limit proof of the actual extent of the plaintiff's injuries nor the amount of damages which she could recover.

HISCOCK, J., dissented.

APPEAL by the defendant, The Town of Chautauqua, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Chautauqua on the 28th day of October, 1902, upon the verdict of a jury for $4,500, and also from an order bearing date the 21st day of October, 1902, and entered in said clerk's office, denying the defendant's motion for a new trial made upon the minutes.

A. B. Ottaway, for the appellant.

Jerome B. Fisher, for the respondent.

WILLIAMS, J.:

The judgment and order should be affirmed, with costs.

The action was to recover damages for an injury upon a defective bridge in the town of Chautauqua.

No claim is made that the evidence was not sufficient to warrant a finding that the commissioner of highways was negligent and the plaintiff free from negligence, and that she was injured and suffered the amount of damages for which the verdict was rendered.

The principal contentions relate to the statement presented to the supervisor of the town in behalf of the plaintiff under section 16 of the Highway Law of the State (Laws of 1890, chap. 568). That section provides: "Every town shall be liable for all damages to person or property sustained by reason of any defect in its highways or bridges existing because of the neglect of any commissioner of highways of such town. No action shall be maintained against any town to recover such damages unless a *verified statement of the cause of action* shall have been presented to the supervisor of the town within six months after the cause of action accrued; and no such action shall be commenced until fifteen days after the service of such statement."

The statement served in the case, among other things, contained the following: "That by reason thereof the claimant was badly bruised and suffered a severe injury to her *right leg at and about the knee*, sustained a severe shock, was made sick, suffered much pain, is so far disabled that she is compelled to lie in bed and has been obliged to pay large sums of money for medical attendance and care and has been incapacitated from attending to her ordinary duties in caring for herself or deriving any benefit from her visit among her friends and acquaintances * * * to her great damage in the sum of one thousand dollars."

Upon the trial the court, under defendant's objection, permitted proof of injuries other than those to the *right leg at and about the knee*, particularly of an *intercapsular fracture*, an injury of a serious nature to the hip, and the court refused to reduce the verdict rendered for such injury, $4,500, to the amount stated in the statement served, $1,000. There is no reason to suppose that the plaintiff intended at the time she made and served her statement to misrepresent her injuries. The accident occurred August 4, 1901, and the claim was made and served ten days later. At that time the injury appeared to be confined to the lower leg and vicinity of the knee. The doctor in attendance so believed and advised her, and she had no reason to suppose the damage would be greater than $1,000. The complaint

was served in February and the trial occurred in April, 1902. The complaint was broad enough to admit proof of the more serious injury, and the demand was for $5,000 damages. It was not discovered what the real nature and extent of the injury was until just before the trial took place. The requirement of the statute is not specific, but quite general, "*a verified statement of the cause of action.*" In the absence of any intention to mislead the town it would be hard to deprive the claimant of the right to recover adequate damages for the actual injuries she sustained, because she was ignorant of the real extent thereof when she verified her claim. Being required to swear to the truth of the statement, she could only state the nature and extent of her injuries as she then understood and believed them to exist. No provision is made by statute for amending the statement after it is served, and no new statement can be served after the expiration of six months from the accident. In this case the real nature and extent of the injury was not discovered until the six months had expired. The statement is to be "*of the cause of action.*" It should state facts showing the occurrence of the accident, the defects in the bridge which caused it, that the commissioner of highways was negligent and the plaintiff was free from negligence, and that the plaintiff was injured and was entitled to damages therefor. It might well state the nature and extent of the injuries sustained and the amount of damages claimed therefor, but the amount of damages would be merely an estimate and they would not be restricted to the amount stated. (*Reed* v. *Mayor, etc., of N. Y.*, 97 N. Y. 620.)

The statement as to the nature and extent of the injuries might be in quite general language and not at all specific. The statement need not be as full and complete as the complaint in an action. Its object is to give the town notice of the claim, so as to enable it to investigate the same, and then to adjust it or be prepared to defend an action brought to enforce the same. The statute should receive a reasonable construction, and not such a one as to unjustly deprive a party of the right to recover adequate damages for the real injuries received. A substantial compliance with the statute should be held sufficient. (See *Spencer* v. *Town of Sardinia*, 42 App. Div. 472, and cases therein referred to.)

In this statement besides the facts stated as to the injury "at and

about the knee," there are general statements, viz.: She "was badly bruised, * * * sustained a severe shock, was made sick, suffered much pain, is so far disabled that she is compelled to lie in bed, * * * and has been incapacitated from attending to her ordinary duties," etc. A strict construction, such a construction as would be given to a complaint in an action, might make all these general statements refer to the specific injury stated, viz., to the leg, "at and about the knee," but such construction should not be given here. The object of the statute was fully served, and its letter substantially complied with by the statement made, and the real nature and extent of the injuries could be proved on the trial and recovered for.

While parts of the charge read by themselves appear to state the law erroneously, yet when the whole charge is read together no reversible errors appear to have been made.

We conclude that the judgment and order should be affirmed, with costs.

All concurred, except HISCOCK, J., dissenting in an opinion, and McLENNAN, P. J., not sitting.

HISCOCK, J. (dissenting):

I am unable to concur in an affirmance of the judgment appealed from, but think the same should be reversed because of the admission upon the trial of evidence of serious injuries alleged to have been sustained by plaintiff which were not in any way set forth or described in her notice of claim filed under the statute.

This action was brought to recover for personal injuries claimed to have been suffered by plaintiff through the negligence of defendant in allowing a bridge upon one of its highways to become defective. There was sufficient evidence upon the questions of defendant's negligence and plaintiff's freedom from contributory negligence to support the judgment, and I pass immediately to the consideration of the question above suggested.

Section 16 of the Highway Law (Laws of 1890, chap. 568) provides: "Every town shall be liable for all damages to person or property sustained by reason of any defect in its highways or bridges existing because of the neglect of any commissioner of highways of such town. No action shall be maintained against any town to recover such damages unless a verified statement of the cause of

action shall have been presented to the supervisor of the town within six months after the cause of action accrued."

Plaintiff's verified statement filed under the foregoing statute, so far as it relates to her injuries, reads: "That by reason thereof (the accident) the claimant was badly bruised and suffered a severe injury to her right leg at and about the knee, sustained a severe shock, was made sick, suffered much pain, is so far disabled that she is compelled to lie in bed * * * to her great damage in the sum of one thousand dollars."

Upon the trial, in spite of the objections interposed in due time and form by the defendant, plaintiff was allowed to give evidence that she had sustained an intercapsular fracture of the hip. These objections taken upon the trial and now urged upon this appeal present the two questions, *first*, whether plaintiff's notice did fairly cover and include the alleged injury to her hip, and, *second*, whether if it did not, it was still permissible for her to give evidence of such injury.

It does not appear to be seriously urged by respondent's counsel that the notice served by plaintiff did really and clearly specify any such injury as that mentioned. We do not think that upon any fair construction of the language used it did either specifically point out such an injury or by general language include it. The words that plaintiff "sustained a severe shock, was made sick, suffered much pain, is so far disabled that she is compelled to lie in bed," even if they are not exclusively predicated upon the injury to her knee mentioned, still are not appropriate to describe the breaking of the hip. The statement that she was "badly bruised" does not naturally convey the idea of a broken bone or joint, and the further statement that she "suffered a severe injury to her right leg at and about the knee," not only does not include the injury to the hip, but excludes the idea of any further injury such as the breaking of the bone at the hip on the same leg.

Respondent's counsel, however, argues that even though the foregoing construction of her notice be adopted, it was still sufficient.

He does not base this contention upon any claim that a statement of her cause of action called for by the statute should not include an enumeration of the injuries alleged by her to have been received. Again, we do not see how he could do otherwise than concede that

it should include such a statement of injuries. In its simplest form a statement of her cause of action would set forth default and negligence of the defendant with resulting injuries to herself from which damages flowed.

Counsel, however, calls to our attention various decisions of the courts which he insists formulate the rules that a reasonable construction is to be put upon a statute of this kind having reference to the object sought thereby to be effected, and, as especially bearing upon the precise point under consideration, that a preliminary notice of claim will not be subjected to any such exacting canons of interpretation as would be applied to a formal pleading. Seeking to avail himself of these and other similar principles, he urges that in a general way plaintiff, in connection with other matters set forth in her statement, gave defendant notice that she had suffered various injuries as the result of her accident and that her notification was sufficient for all practical purposes even though it did not point out the particular injury proved upon the trial against the objection of defendant.

There is no difficulty in accepting the general principles thus pressed upon our attention so far as they are outlined in the decisions of the courts. The difficulty lies in accepting the results claimed to be authorized thereby as applied to the notice under review. As against these general principles invoked for the benefit of the plaintiff, we must keep in mind certain others which have been laid down as governing the construction of statutes, such as that which now confronts her.

It has been held that while courts should not "by a strained technical interpretation build up immaterial and unsubstantial variances or omissions into inequitable and unjust defenses against meritorious claims, * * * upon the contrary, they should not lightly and easily go to the other extreme of devising excuses for, and ways of escape from, failure to comply with reasonable and important provisions." (*Rauber* v. *Village of Wellsville*, 83 App. Div. 581.)

It has also been said that, "Clearly the Legislature had the right to impose such a condition (requiring the service of a notice as a condition precedent to bringing a suit), and no reason is apparent why a forced or strained construction should be placed upon the

language of the statute for the purpose of relieving a litigant from the necessity of complying with the plain terms thereof." (*De Vore* v. *City of Auburn*, 64 App. Div. 84.)

And, again, it has been said that courts "have no right to add anything to the statute or to take anything from it, and to permit any departure from its plain terms is to introduce into it an element of uncertainty, and open the way for a complete breaking down and nullification of the statute. * * * The requirements of the statute are simple and easily complied with, and their strict enforcement will prevent ultimate confusion and uncertainty." (*Borst* v. *Town of Sharon*, 24 App. Div. 599.)

So, also, in answer to the suggestion made that plaintiff has acted in good faith and attempted to comply with the statute, we must bear in mind that our construction of the statute is not to be tested so much by the merits of the particular case under review as by the possibilities of what it will permit in other cases which may arise.

There is no doubt that the injury to the hip was the most substantial source of damages established in this case. This appears plainly enough upon the face of the evidence, and if further demonstration upon that point were wanting it would be found in the fact that plaintiff recovered a verdict of $4,500 with that element in the case, whereas she had only asked originally for $1,000 upon the allegation of an injury to her knee.

Therefore, if we are right that the statement of plaintiff's cause of action in her original notice was deficient in that it did not fairly point out and cover the injury to her hip, and, notwithstanding that fact, it was still permissible for her to give evidence of such a serious injury, then we see no limit, in the matter of injuries at least, to the departures which a claimant upon the trial of his action may make from his original notice. If it is possible for this plaintiff, upon a statement in her notice of injuries to her knee, to prove a breaking of her hip, then it follows with perfect logic that upon a notice alleging a breaking of a finger a claimant would have the right to show a breaking of the arm, and upon a statement of an injury to the heel to show a breaking of the leg, and upon a statement of an injury to the rib to show a fracture of the spine, and so on. In short, without further illustration a construction of the statute such

as plaintiff contends for in this case would, in my judgment, lead to a nullification of it so far as concerns any requirement for a preliminary statement and notice of injuries claimed to have been sustained.

I am unwilling to proceed in the direction of such a result, and none of the cases cited in behalf of the respondent present to my mind any parallel between the questions there under review and the one here discussed.

It is said, however, that in this case there are special reasons why plaintiff should be allowed to enlarge upon the injuries enumerated in her notice, and this contention is based upon the theory and supposition that the particular injury to her hip was unknown to her in time to include it in her notice. In my opinion, the facts in this case do not call upon us for a decision of the question whether the plaintiff upon the trial of an action should be allowed to give proof of injuries which were not and could not be discovered in time to include them in the notice required to be served under the statute. The facts in this case do not seem to establish such an excuse for the omission from plaintiff's notice of a statement of the injuries to the hip.

The notice in evidence was served August 15, 1901, the injury having occurred August 4, 1901. While no provision is made in the statute for amending this notice, there is no question but that another and second one might have been served at any time before the expiration of six months from the date of the accident.

As bearing upon the question whether plaintiff knew or ought to have known that her hip was injured, some extracts from the evidence may be quoted.

Speaking of a period immediately succeeding the accident, she testified to intense pain in the hip as well as in the knee; the limb was black and blue from the hip to the ankle. Dr. Belknap, who attended her immediately after the accident, treated her entire limb, and Dr. Atterbury, who was called within a period of six months, treated her for the entire limb. Dr. Belknap, already mentioned, testified that her limb "was black and blue, bruised the whole length from ankle to hip." Dr. Atterbury testified that he found the limb contused and badly swollen its whole length, and that "any motion of the limb would cause pain at the knee and also at the hip." He

says he did not discover any intercapsular fracture at the time, but he "suspected it." And again, in answer to a question by the court, he says, "I suspected a very serious injury to the hip and I could not possibly diagnose an intercapsular fracture at that time on account of the swelling and contusion and my treatment was to that effect, a fracture at hip; I suspected it and I used that precaution."

The evidence seems to make it pretty plain that the plaintiff and the physicians attending her knew, or in the exercise of a reasonable examination ought to have known, that her hip was injured. It seems almost past comprehension that plaintiff for the period of six months under the attention of at least two physicians should fail to know that her hip had been broken.

It certainly seems entirely clear from the evidence that by a reasonable examination and formulation of the information derived thereby, plaintiff within six months from her accident might have prepared a notice which would warn defendant of an intended claim of injury to her hip, even though such injury was not pointed out in terms of minute definiteness. If she could have done this, then I do not think she can be relieved from her failure so to do upon any theory that she should not be held liable for not performing impossibilities. If compliance with the statute is to be enforced, I do not think it is harsh at least to lay down the rule that a claimant must take reasonable pains to ascertain for the purposes of his notice what his injuries are, and that if he fails to do this he shall not be allowed to prove them upon the trial. If quite palpable and serious injuries are overlooked and not included in the notice, the person who has overlooked them should suffer rather than the municipality which is without responsibility or fault in this respect and is entitled to a compliance with the statute if it can be had by the exercise of a reasonable effort.

I think the judgment and order should be reversed and a new trial granted.

Judgment and order affirmed, with costs.

In the Matter of the Final Judicial Settlement of the Account of ANNA M. C. WILKIN, as Trustee under the Last Will and Testament of JAMES CUNNINGHAM, Deceased, Respondent.

MARY E. CUNNINGHAM and Others, Appellants; CHARLES E. CUNNINGHAM and Others, Respondents.

Will — exercise, before 1903, *of a discretionary power to pay over a trust fund by one of two trustees who has alone qualified — jurisdiction of the Surrogate's Court to decide whether the discretion was properly exercised — liability where the power has been improperly exercised — section* 111 *of the Real Property Law applies to a power over personal property.*

The will of James Cunningham, deceased, appointed Joseph T. Cunningham executor thereof, and provided: "*Ninth.* I give, devise and bequeath unto the executor of this my last will and testament hereinafter to be nominated and appointed, the sum of one hundred and forty-six thousand dollars ($146,000), in trust, however, to be by him invested, and to be paid together with the increase thereof, to my son Charles E. Cunningham, or to his wife or children at such time or times, in such sums and in such manner, as such executor may deem best for the interest of said Charles E. Cunningham. And I hereby authorize him, if from any cause he deems it best so to do, at any time after ten years from my death, to give the whole sum of this devise and bequest, then remaining in the hands of such executor (if any part shall then remain) or any part thereof, in equal proportions to the children of said Charles E. Cunningham, then living, to whom, in that event, I give, devise and bequeath the same."

"*Thirteenth.* In case my son, Joseph T. Cunningham, shall at any time prior to the full completion of the trust I have imposed upon him as executor of this will, for any cause, cease to act as such executor, I hereby, in that event, nominate and appoint Anna M. Cunningham and Rufus K. Dryer to be and act as executors in his stead."

Joseph T. Cunningham resigned as executor and trustee after serving for twelve years. Dryer renounced his right under the 13th clause of the will to be appointed executor and Anna M. Cunningham alone qualified.

Thereafter, prior to the year 1903, Anna M. Cunningham assumed the right to terminate the trust and transferred the entire trust fund to Charles E. Cunningham.

Held, that the executors were "testamentary trustees," as defined in subdivision 6 of section 2514 of the Code of Civil Procedure, and that, upon the settlement of the accounts of Anna M. Cunningham, the Surrogate's Court had jurisdiction under subdivision 3 of section 2472 of that Code to determine whether she had properly disposed of the principal of the trust fund;

That the will created a power as that term is defined in section 111 of the Real Property Law (Laws of 1896, chap. 547), first, in Joseph T. Cunningham, and

then, after he ceased to act as executor, in Anna M. Cunningham and Rufus K. Dryer;

That section 111 of the Real Property Law, so far as powers are concerned, applies to personal as well as real property;

That the action of Anna M. Cunningham in assuming prior to the year 1903 to terminate the trust was unauthorized, as there was, at the time the trust fund was transferred by her, no statutory provision authorizing one of two persons, upon whom a power is imposed, to exercise such power where both persons are living but one refuses to act;

That even though Anna M. Cunningham was vested with a discretionary power to pay the principal of the fund to Charles E. Cunningham, she, having exercised such discretion unwisely and improperly, was liable to account for the trust fund paid over by her.

APPEAL by Mary E. Cunningham and others from a decree of the Surrogate's Court of the county of Monroe, entered in said Surrogate's Court on the 24th day of February, 1903, finally settling the accounts of Anna M. C. Wilkin, as trustee under the last will and testament of James Cunningham, deceased.

James M. E. O'Grady and *John Desmond*, for the appellants.

Nathaniel Foote, *Herbert Leary* and *Eugene Van Voorhis*, for the respondents.

WILLIAMS, J.:

The decree should be reversed, with costs to appellants payable out of the income of the fund, and a new trial granted as hereinafter provided.

The trust in question was created under the will of the deceased. The clauses relating to the trust are, viz.: "*Ninth.* I give, devise and bequeath unto the executor of this my last will and testament hereinafter to be nominated and appointed, the sum of one hundred and forty-six thousand dollars ($146,000) in trust however, to be by him invested, and to be paid together with the increase thereof, to my son Charles E. Cunningham, or to his wife or children at such time or times, in such sums and in such manner, as such executor may deem best for the interest of said Charles E. Cunningham. And I hereby authorize him, if from any cause he deems it best so to do, at any time after ten years from my death, to give the whole sum of this devise and bequest, then remaining in the hands of such executor (if any part shall then remain) or any part thereof, in equal proportions to the children of said Charles E. Cunningham,

then living, to whom, in that event, I give, devise and bequeath the same."

"*Thirteenth.* In case my son, Joseph T. Cunningham shall at any time prior to the full completion of the trust I have imposed upon him as executor of this will, for any cause, cease to act as such executor, I hereby, in that event, nominate and appoint Anna M. Cunningham and Rufus K. Dryer to be and act as executors in his stead."

The deceased died May 15, 1886. His will was probated in June, 1886, and Joseph T. Cunningham was appointed executor. He took the trust fund, and administered it while he continued as executor. In February, 1898, upon his own petition, the letters issued to him as executor and trustee were revoked. Dryer renounced his right to serve, and Anna M. (now Wilkin) was appointed executor under the 13th clause of the will. The principal of the trust fund of $146,000 was transferred to the new executor. The former executor accounted and was discharged, and the new executor entered upon the performance of her duties as such. The account of the new executor, filed upon her final judicial accounting, showed that she received the principal of the trust fund and the income accrued thereon, and that she had paid the whole over to Charles E. Cunningham, the principal, viz.:

January 2, 1901	$6,000
November 7, 1891	10,000
February 14, 1902	130,000
	$146,000

The proceeding for the final accounting was commenced by her February 21, 1902.

The contestants are the wife and children of Charles E. Cunningham. They made no question as to the payments of the income of the fund. They objected to the payments of the principal, upon the grounds, among others:

First. That the executor had no authority to exercise the discretion given by the will to terminate the trust by the paying of the fund to Mr. Cunningham.

Second. That the discretion was not properly exercised; that Mr. Cunningham was an habitual drunkard, was not competent to have

the control of the fund, and that the executor acted in bad faith and paid the fund to Mr. Cunningham with knowledge that he would waste and squander the same.

It does not appear to be contended on the part of the contestants that there was want of jurisdiction in the Surrogate's Court to determine the questions raised by them. The claim is that he erroneously decided them.

The executors, under the will, were "testamentary trustees," as defined by subdivision 6 of section 2514 of the Code of Civil Procedure. Surrogates' Courts are, by subdivision 3 of section 2472 of the Code, given jurisdiction to settle the accounts of such trustees, and it would seem that, as incidental to such settlement, that court had power to determine whether the principal of the trust fund had been properly disposed of.

First. The alleged want of authority in the executor, Mrs. Wilkin, to exercise the discretion given by the will, to pay over the principal of the fund, and thus terminate the trust, is based upon the fact that the exercise of such discretion was vested in two persons, Mrs. Wilkin and Mr. Dryer, and the proposition is that both must unite in the exercise of the discretion in order to make the disposition of the principal legal. The will, by the two clauses we have quoted, created a power first in the elder son and, after he ceased to act as executor, in the daughter and son-in-law, as defined by section 111 of the Real Property Law (Laws of 1896, chap. 547 re-enacting 1 R. S. 732, § 74). While this law by its terms relates to real estate only, yet it is held that the Legislature intended, so far as *powers* were concerned, that the same rules should apply to personal property. (*Matter of Moehring*, 154 N. Y. 423, 427, and cases therein referred to.)

Those cases were decided under the Revised Statutes (See 1 R. S. 732, § 73 *et seq.*), but the provisions of those statutes were substantially re-enacted in the Real Property Law (§ 110 *et seq.*) By those statutes the rules of the common law were abrogated, and new rules were established. At common law, when the execution of a power was imposed upon two or more persons all must join in such execution. This was one of the well-settled rules of the common law. The statutory rule is established by section 146 of the Real Property Law, which provides that "where a power is

vested in two or more persons, all must unite in its execution; but if before its execution, one or more of such persons dies, the power may be executed by the survivor or survivors," and by section 154, which provides that "where the consent of two or more persons to the execution of a power is requisite, all must consent thereto; but if, before its execution, one or more of them die, the consent of the survivor or survivors is sufficient, unless otherwise prescribed by the terms of the power."

Section 2818 of the Code of Civil Procedure, as it existed prior to 1903, made no provision for a case where, as here, one of two or more testamentary trustees renounced and failed to qualify. (See Laws of 1884, chap. 408.) The section was amended in 1903 so as to provide, among other things, that where one of two or more such trustees renounces, a successor shall *not* be appointed except where such appointment is necessary in order to comply with the express terms of the will, or unless the Surrogate's Court, or the Supreme Court, shall be of the opinion that the appointment of a successor would be for the benefit of the *cestuis que trust*, and unless and until a successor is appointed the remaining trustee or trustees may proceed and execute the trust as fully as if such trustee or trustees had not renounced. (See Laws of 1903, chap. 370.) It is unnecessary to consider the effect of this section, as amended, because it was not in force until May 6, 1903, long after all the principal of the fund had been paid over and the trust terminated so far as Mrs. Wilkin could terminate it. There appears to be no other statutory provision with reference to the authority of one person to execute a power, imposed upon two persons, where both are still living and one renounces and refuses to act.

The surrogate says: "It is manifest that the testator intended that the discretion conferred by the will should be exercised by his sole executor and son, so long as he acted, and thereafter *by the joint action and agreement* of the succeeding executors named," and he adds: "The law of the land is a part of every instrument. The testator must be presumed to have conferred these powers with the knowledge that they could not be exercised until such executor qualified, and that it was the right of any or all of them to decline to serve. Code, No. 2613*."

* See Code Civ. Proc. § 2639.—[REP.

And he arrives at the conclusion, therefore, that Mrs. Wilkin could exercise the discretion and execute the power of disposing of this large fund of $146,000 without the concurrence of Mr. Dryer, upon the presumption that the testator intended, by the provisions of his will, that she might so act, if Mr. Dryer renounced and refused to act. We are unable to assent to such a construction of the will, or to the presumption of such an intent. If the will is to be construed as imposing this discretion and power upon Mrs. Wilkin and Mr. Dryer *jointly*, then it could not be exercised or executed, Mr. Dryer being still alive, unless both united in such action. The statute is clear and explicit. The surrogate realized this and only escaped the effect of the statute by construing the will as permitting one of the persons to act alone when the other renounced and refused to act. In this we think he erred.

Second. Even if the authority to exercise the discretion existed under the statute and the provision of the will, the payment of the principal of the fund to Mr. Cunningham and the attempted termination of the trust thereby was not, under the circumstances, the exercise of a *sound* discretion. We have examined these questions of fact with a good deal of care because of the importance thereof to the wife and children of Mr. Cunningham, because the result arrived at by the surrogate seems to us to be wrong and because he appears to have arrived at such result very reluctantly. A few passages from his opinion may well be referred to, he having heard the whole controversy and considered all the evidence. He says: "We may think that, if the testator could speak, he would advise the continuance of the trust for the support of his son, with remainder to his wife and children. We may infer that the first executor, after getting the judgment of the Supreme Court that the trust was valid, and to be terminated only in the exercise of a sound discretion through one of the dispositions created by the will, wearied with demands he did not feel justified in fulfilling, resigned. We may think that the co-executor named renounced from disinclination to pay over the entire trust fund, and we may be of the opinion that it were better and more consonant with testator's desire that the fund remain in trust for the life use of Charles and his family, with ultimate benefit to surviving children, but neither of these views is decisive. To the discretion of the acting executor the testator

committed the execution of this power of disposal. She has exercised that discretion. * * * Unless we can find * * * that the executor was actuated by bad faith, that she obeyed a willful purpose rather than the dictates of her judgment, we must affirm, or at least decline to reverse her action. * * * It is shown that bitterness and ill feeling exist between the trustee (executor) and the wife of the principal beneficiary (Mr. Cunningham). If the fund was paid over to gratify animosity, it should not be sustained; but the evidence does not make it *impossible* to have been paid over in the honest discharge of duty by the trustee."

In these expressions of the surrogate in his opinion are grouped together the subjects for consideration upon this question of fact. It seems to us that the surrogate should from the evidence have arrived at a different conclusion than he did.

The judgment referred to by the surrogate has settled some things between the present parties who were all before the court when that judgment was rendered. It will be remembered that the deceased died May 15, 1886. His elder son Joseph served as executor until February, 1898. The action referred to was begun in December, 1896, and the judgment was entered in June, 1897. It was determined in that case that there were special reasons operating upon the mind of the testator which induced him to make the trust in question, and that the reasons which then operated upon his mind still continued, though more than eleven years had passed since the death of the testator. Can it be fairly said that such reasons had ceased to exist during the four or five years after that judgment had been rendered? Is it pretended that the habits of Mr. Cunningham had become any better so that his ability to care for this large fund confided solely to his charge had improved in any respect, or that his treatment of his wife and children had become more tender or protective during that time? The evidence and the findings of fact by the surrogate contained in the decision, and in the answers to the requests by the contestants, furnish only a negative answer to these questions. We need not go into details. It is certainly true that Mr. Cunningham was no better fitted to have the absolute control of this fund in 1901 and 1902 than he was when this judgment was rendered in 1897 or when the testator died in 1886. It was further determined in that case that the testator

did not intend to make any special discrimination against his son Charles, but he *did* intend to provide for his support and maintenance and that of his wife and children, and that the trust should continue during the life of Charles, subject to its termination under the *ninth* clause of the will, and that the disposition of the fund should be made only in the exercise of a *sound* discretion. The court practically held in that action that the fund should not then be paid over; that the same reasons still continued for withholding it from Charles that existed at the time of the death of the testator and, if his wishes were to be regarded, a *sound* discretion would not then permit such disposal of the fund. The suggestion by the surrogate as to what the testator would desire or advise if he could speak was a wise suggestion, and one that any impartial judge would concur in under the evidence. It is evident that Joseph would not pay over the fund, and that Mr. Dryer would not concur with Mrs. Wilkin in doing so. Thereupon Joseph resigned and Mr. Dryer renounced the trust and refused to serve. Mr. Cunningham was not on good terms with his wife or children, the latter being, all of them, in sympathy with their mother, and desiring the trust to continue and the principal of the fund to remain intact. They were all sure to suffer from a termination of the trust and a disposition of the fund by placing it under the absolute control of their husband and father. It is perfectly apparent that it was better and more consonant with the testator's desire that the fund remain in trust for the life use of Mr. Cunningham and his family, with ultimate benefit to the surviving children. The brother Joseph, the brother-in-law Dryer, the surrogate, and finally this court all seem to concur in this judgment. All impartial persons would do the same. Under these circumstances was the determination by the executor to pay over the fund the exercise of a *sound* discretion? Clearly not. Why was she determined to take such action? Was it the outgrowth of her bitter feeling of animosity towards her sister-in-law, Mrs. Cunningham? Was it in fact her desire to secure payment of moneys owing by her brother Charles to herself or for the payment of which she was liable? Some of the fund was used for such purpose. Did she act in good faith, for the best interests of *all* the parties interested in the trust fund, or indeed for the best interests of *any* of the parties.

It seems to us not. Mr. Cunningham did not need the money for use in any business he was then engaged in or desired to engage in. The surrogate so found. The fund, or a large part of it, was almost certain to be squandered and lost if placed in his custody. Mrs. Wilkin for some purpose, honest or dishonest, malicious or willful or otherwise, was determined that this fund should be put beyond the reach of the wife and children, and in the absolute custody of the husband, and, therefore, disrespecting the wishes of the deceased, her father, and the judgment of her brother Joseph and her brother-in-law, Mr. Dryer, and without asking the direction of the court, which would certainly have been denied if asked for, she made haste to exercise the discretion and to pay over the money and terminate the trust.

The surrogate felt compelled, reluctantly, to "affirm, or at least decline to reverse, her action." The matter comes to us for our action, and we must determine the question. We cannot concur in the disposition of the matter made by the surrogate on the merits, the facts. Our conclusion is that the fund has not been properly disposed of by the executor and must be regarded as still in her hands, to be held by her under the terms of the will or until the court shall otherwise direct as to the disposition thereof.

The decree of the Surrogate's Court should be reversed upon the law and the facts, with costs to the appellants to abide event, payable from the income of the fund in controversy, and a new trial and hearing granted, upon condition, however (the parties consenting), that one hundred and forty thousand dollars ($140,000) of the fund be deposited to the credit of the executrix, Anna M. C. Wilkin, viz., forty thousand dollars ($40,000) with the Traders' National Bank of Rochester, N. Y.; fifty thousand dollars ($50,000) with the Rochester Trust and Safe Deposit Company, and fifty thousand dollars ($50,000) with the Fidelity Trust Company of Rochester, N. Y., there to remain during the pendency and until the final determination of this proceeding or the further order of this court, and the institutions above named to pay interest upon the amounts deposited with them respectively at the rate of four per cent. The interest to be paid to the said executrix upon her drafts or checks, but the principal not to be subject to her draft or check, unless accompanied by a certified copy of an order of this court directing such payment,

such order to be granted only upon notice of the application therefor to the attorneys for all the parties which shall have appeared in this proceeding, and a certified copy of the order entered upon this decision to be delivered to each depositary of the fund at the time of making the deposit; an application to change the depositaries of the fund or of any portion thereof to be made by the executrix whenever there shall be a reduction of the rate of interest below four per cent.

Receipts from the several depositaries, showing compliance with the order entered upon this decision, to be filed with the clerk of this court on or before the 2d day of February, 1904.

And upon the further condition (the parties consenting) that upon such new trial and hearing the parties may read from the stenographer's minutes any evidence given upon the former trial and hearing.

In the event that there shall be a failure to make deposit of one hundred and forty thousand dollars ($140,000) of the fund as herein provided no new trial is granted, but the decision in that event is that there remains in the custody of the executrix undisposed of one hundred and forty thousand dollars ($140,000) of the principal of such trust fund and that the Surrogate's Court make and enter a decree necessary to carry this decision into effect and that the appellants have costs of the appeal, payable from the income of such part of the trust fund.

All concurred; SPRING and HISCOCK, JJ., upon second ground stated in the opinion only.

Decree of Surrogate's Court reversed upon the law and the facts, with costs to the appellants payable out of the income of the fund, and matter remitted to the Surrogate's Court for such further proceedings as may be proper.

JOHN GOODFRIEND, Respondent, v. TOWN OF LYME, Appellant.

Claim against a town — money due under an agreement for the support of a pauper child — the remedy is not by action — the claim should be presented for audit.

An individual cannot maintain an action against a town to recover moneys alleged to be due to him under an agreement with the town board for the support of a pauper child which was a charge upon the town, as such claim is a town charge, and, under the provisions of section 180 of the Town Law (Laws of 1890, chap. 569), the exclusive remedy of the claimant is to present the claim to the town board for audit and to review their action by mandamus or certiorari.

APPEAL by the defendant, the Town of Lyme, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Jefferson on the 5th day of February, 1902, upon the verdict of a jury, and also from an order entered in said clerk's office on the 27th day of January, 1902, denying the defendant's motion for a new trial made upon the minutes.

John N. Carlisle, for the appellant.

J. W. Cornaire, for the respondent.

WILLIAMS, J.:

The judgment and order should be reversed and a new trial granted, with costs to the appellant to abide event.

The action was brought to recover compensation for the support of a pauper child, a charge upon the town, under an alleged agreement with the town board. Recovery was sought for the years 1896 to 1900, both inclusive, at $65 per year, less a small amount paid, and the verdict was for $323.75. Claims for some of the time were presented to the town board and some allowances were made. There was never any review of the action of the board by mandamus or certiorari. The plaintiff claimed, and the court held, that, regardless of the action of the board, the plaintiff had his remedy by action to recover the sum claimed to be owing him from the town. In this the court erred. This question was

directly passed upon by us in *Bragg* v. *Town of Victor* (84 App. Div. 83).

The claim there sought to be recovered upon was a town charge under the provisions of section 180 of the Town Law (Laws of 1890, chap. 569), and it was provided by that section that all town charges should be presented to the town board for audit. We held that the remedy so provided was exclusive and an action would not lie. The claims here sued upon are also town charges and the same rule is applicable. A short quotation from the opinion in that case will indicate the principle laid down there: "No money could be raised with which to pay the claim except through the proceedings provided by law, the presentation of the claim to the town board, its audit by the board, the certificate thereof to the board of supervisors, the levying of the same as a tax upon the town, collection by the collector, payment to the supervisor of the town, and then payment by him to the plaintiff. None of these proceedings were taken in this case, and the law is well settled that an action will not lie against the town to recover a claim which is a proper one for audit by the town board. There is no other way provided by law to raise the money, and the town officials cannot proceed in this way unless the claim is first presented to such board for audit. If the claimant fails to set these proceedings in motion, he certainly ought not to be permitted to make the town liable for the costs of an action resulting in a judgment, which must then be presented to the town board for audit in order to enable the town to raise the money to pay it. He may as well present his claim without the costs as to present the judgment including costs. The remedy suggested is adequate and exclusive. If the town board refuses to act it may be compelled by mandamus. If it acts, and disallow the claim or reduce the amount it may be reviewed by certiorari. The policy of the law is very clear," etc. (See, also, *Colby* v. *Town of Day*, 75 App. Div. 211; *Holroyd* v. *Town of Indian Lake*, 85 id. 246.)

These cases have arisen under the Town Law enacted in 1890. Prior to the passage of that law it was well settled that the remedy by presentation to and audit by the town board was exclusive, and that no action would lie. (*People ex rel. Myers* v. *Barnes*, 114 N. Y. 317.)

We conclude that the judgment and order should be reversed and a new trial granted, with costs to appellant to abide event.

All concurred.

Judgment and order reversed and new trial ordered, with costs to the appellant to abide event, upon questions of law only, the facts, having been examined and no error found therein.

VILLAGE OF CANANDAIGUA, Plaintiff, v. WILLIAM J. HAYES and Others, Defendants.

Village of Canandaigua — issue by, of bonds for street paving purposes — what proceedings must be taken to authorize it.

The village of Canandaigua, which is incorporated under a special act (Laws of 1893, chap. 666), has power, under sections 128 and 340 of the Village Law (Laws of 1897, chap. 414, as amd. by Laws of 1903, chap. 617), to issue bonds for street paving purposes.

Section 4 of title 7 and section 27 of title 9 of the charter of the village are not inconsistent with the existence of the power to issue bonds for such purposes.

Semble, that the proceedings for the submission to the taxpayers of the village of the proposition to issue the bonds must be taken under sections 55, 59 and 60 of the Village Law, construed in connection with section 5 of the General Municipal Law, and not under sections 2 and 3 of title 7 of the charter of the village.

Where, however, the village, in attempting to secure authority to issue the bonds, proceeds under sections 2 and 3 of title 7 of the charter, but does not comply with the provision of section 3 of such title which provides, "Before any tax for a special purpose can be levied, a resolution specifying the purpose, and the amount required, and whether it shall be raised in one sum or in annual installments and, if in annual installments, the number thereof, and the amount of each, shall be passed by the board of trustees," nor comply with section 5 of the General Municipal Law which provides that where a funded debt is contracted by a municipal corporation, the resolution proposing it "shall provide for raising annually by tax a sum sufficient to pay the interest and the principal as the same shall become due," the procedings are fatally defective.

A statement in the resolution providing for the issue of bonds, "That a sum sufficient to pay the interest and principal of said bonds, as the same shall become due, be raised by an annual tax, as other taxes for general purposes in said Village are raised," is not a sufficient compliance with section 5 of the General Municipal Law.

Semble, that the resolution should state the installments in which the bonds were to be made payable and which were to be met every year.

SUBMISSION of a controversy upon an agreed statement of facts, pursuant to section 1279 of the Code of Civil Procedure.

The plaintiff has made and executed bonds to the amount of $100,000, the proceeds of which, if sold, are to be used in paying plaintiff's share of the expense of paving and improving certain streets within its limits.

The defendants have agreed to purchase and pay for said bonds, provided the same are legal and binding obligations. This controversy arises between the parties over the question whether they are such good and valid obligations, and the plaintiff asks the decree of this court adjudging them to be so and compelling defendants to perform their agreement and accept and pay for said bonds.

F. H. Hamlin, for the plaintiff.

David G. Lapham and *Thomas W. Heatley*, for the defendants.

HISCOCK, J.:

The defendants assert that the bonds in question are invalid for the reasons, *first*, that the plaintiff had no power to issue bonds for street paving or improvement purposes; and, *second*, that even if it did have such power, the proceedings adopted by plaintiff for the making and issuing of these bonds were not in accordance with the requirements of law.

We shall consider these objections in the order stated.

We feel no hesitation in deciding that the village did have power to issue bonds for the purpose of raising and providing funds with which to pay its share of the cost of paving streets.

The village of Canandaigua was originally incorporated in 1815 under a special act of the Legislature (chap. 254.) By chapter 666 of the Laws of 1893 the original act and the acts amending the same were revised and consolidated, and the corporation exists at present under the provisions of the act of 1893 and its amendments.

By subdivision 50 of section 3 of title 3 of its charter created as above plaintiff was empowered "to do all such acts, perform all such duties, and exercise all such powers as are * * * authorized, imposed, conferred, or granted by any general act of the Legislature of this State, applicable to villages therein, incorporated under a special act."

By section 340 of chapter 414 of the Laws of 1897, known as the Village Law, it is provided: "A village incorporated under and subject to a special law, and each officer thereof, possesses all the powers and is subject to all the liabilities and responsibilities conferred or imposed upon a village incorporated under this chapter, or upon an officer thereof, not inconsistent with such special law."

Section 128 of said Village Law (as amd. by Laws of 1903, chap. 617), provides: "If authorized by an election, money may be borrowed by a village upon its bonds or other obligations, payable in future fiscal years for the purpose of purchasing, constructing and maintaining the following village improvements: * * * 3. Laying out, widening, altering, grading or paving streets, and for the purchase of a steam roller, stone crusher and engine, and other road making machinery."

It follows from these statutory provisions thus quoted that plaintiff was authorized to issue bonds to provide for indebtedness incurred in paving and improving its streets unless there is some provision in its charter which is inconsistent with the powers granted by the Village Law. We do not think there is any such provision. Defendants urge upon our consideration two provisions which they claim are thus inconsistent, but we do not agree with their contention in this respect made.

Section 4 of title 7 of the act already referred to, constituting plaintiff's charter, provides: "Money cannot be borrowed by the said trustees on the credit of the village; nor can any debt or liability be incurred by the village, except as is provided by law, for the ordinary expenses of the village within the income of the current year, applicable to that purpose."

These provisions do not cover this case. The 1st clause quoted plainly prohibits any attempt by the trustees to make general loans upon the credit of the village. The 2d clause voices a prohibition against incurring extraordinary debts or liabilities by the village for ordinary expenses. It relates to the ordinary current financial management of the village from year to year, and does not speak with reference to an extraordinary expenditure such as we now have before our consideration when authorized by a vote of the taxpayers in a proper manner.

The second provision called to our attention by defendants as

inconsistent with the provisions of the Village Law relating to the issue of bonds is section 27 of title 9 of plaintiff's charter, and which provides for the payment of the expense of certain improvements "from the sum or fund raised for highway purposes for the current year, or from the sum raised for contingent and other expenses as the board of trustees shall deem best. If there shall not be sufficient money on hand not otherwise appropriated or needed to pay the same, said sum may be raised by a special tax, as provided in this act, or the same may be raised with the next annual village tax."

It seems to us hardly to have been worth while to refer to this section as bearing upon the question before us, because it is manifestly one of several sections relating to the acquisition of lands for public use by exercise of the right of eminent domain within the corporate limits of said village for roads, avenues, streets, etc. We do not discover any relation or connection whatever between this section thus referred to and the paving of streets.

Upon the other hand, in opposition to the contention of defendants upon this point, the provisions of plaintiff's charter seem to necessarily imply and call for the power to issue bonds as plaintiff has attempted.

Section 2 of title 9 provides that the trustees of the village shall have power to "pave, plank, flag or otherwise improve the streets, roadways, crosswalks and sidewalks." Section 31 of the same title provides that "on the written petition or consent of a majority in number and in feet frontage of the owners of the real estate adjoining, abutting or fronting on any of the streets, highways or public grounds of said village, the board of trustees shall have the power to cause said street, highway or public grounds, and the gutters therein, to be paved or curbed with stone or other suitable material." Said section then further provides that in case the paving of any street is properly ordered without the petition of the property owners, not more than one-half nor less than one-third of the expense of the improvement shall be assessed upon the adjoining property; that in case the improvement is ordered upon the petition of the property owners not more than two-thirds nor less than one-third of said expense shall be so assessed. The balance in either case must be paid by the village. We find in the charter no provision which seems to us directly to provide for the payment by

the village of its share of the expenses of such improvements without resort to bonds. The provisions with reference to the assessment of taxes do not seem to us to meet such requirements. No question is raised in this case but what the plaintiff in good faith and properly has expended and desires to expend the sum of $100,000 in the immediate paving and improvements of its streets. It would be a great burden and an unusual course in municipal government if such expenses should be immediately met by assessment and taxation of property. It is much more in accordance with the spirit of modern municipal government that such extraordinary expenses should be met by the proceeds of bonds extending over and becoming due through a series of years. No objection is urged by defendants that the issue of the bonds in question will in any manner conflict with those general provisions of law which limit the amount of obligations which may be issued by any municipality.

We, therefore, conclude that neither the letter nor the spirit of the statutes applicable prohibited the plaintiff from issuing the bonds.

We now pass to the consideration of the second objection urged by defendants, that the proper steps were not taken to secure a legal issue of bonds for the purposes indicated. This contention is, in our judgment, much more serious. In fact, we feel constrained to agree with it and hold that proper steps were not taken.

It is conceded that the trustees did not have the power to issue the bonds except upon a vote of the taxpayers of the village in accordance with the provisions of law. Sections 55, 59 and 60 of the Village Law provide for the submission to the taxpayers of a village of a proposition to borrow money as plaintiff is attempting to borrow it here by the issue of bonds. The question of the issue of these bonds, however, was not submitted under those provisions, but instead was submitted at a special meeting of taxpayers called under the provisions of section 2 of title 7 of the plaintiff's charter* which provides as follows: "The annual tax meeting of the taxpayers of the village of Canandaigua shall be held on the second Tuesday of February in each year, commencing at ten o'clock in the morning. * * * The trustees of said village are hereby authorized and empowered to call a special tax meeting to vote upon appropriations

*As amd. by Laws of 1894, chap. 131.—[REP.

for special purposes by adopting a resolution for that purpose, which resolution shall be duly published in three of the village newspapers, once in each week for three consecutive insertions next preceding such special tax meeting."

The initial question suggests itself whether this section and the succeeding one which related to it were intended to refer to or cover the issue of municipal bonds. They are found in a title which treats of the "Assessment and collection of taxes." The wording of section 2 of title 7 does not seem especially apt in describing a meeting called to vote upon such an issue of bonds. The provisions of the Village Law for a meeting to vote upon such a question speak of the submission of a "proposition" upon any question which may be lawfully decided thereat, while it will be noticed that the section in plaintiff's charter referred to authorizes the trustees to call a special tax meeting to vote upon "appropriations" for special purposes. The word "appropriations," especially when compared with the much broader one "propositions," found in the Village Law, does not upon a natural construction well describe a proposed issue of bonds extending over a period of years.

Passing by this, however, we come to other considerations based upon section 3 of title 7 of plaintiff's charter. This provides: "Every appropriation of money for any purpose not expressly included or in excess of the amount specified in section one of this title, shall be deemed a special purpose. Before any tax for a special purpose can be levied, a resolution specifying the purpose, and the amount required, and whether it shall be raised in one sum or in annual installments and, if in annual installments, the number thereof, and the amount of each, shall be passed by the board of trustees, and a copy of such resolutions, with a notice that the same shall be submitted to vote by ballot at the next annual tax meeting, or at a special tax meeting, called for that purpose, shall be published in three of the village newspapers at least once in each of the two weeks next preceding such tax meeting. And at the same time, and in the same notice shall be published the several amounts to be raised by tax as provided by section one of this title."

The resolution adopted by plaintiff's trustees providing for the special meeting so far as applicable, reads as follows:

"*Resolved,* That a special tax meeting of the qualified electors of the Village of Canandaigua be and hereby is called to be held at the Town Hall in the Village of Canandaigua, N. Y., on Tuesday, the 5th day of May, 1903, commencing at 10 o'clock in the morning and closing at 4 o'clock in the afternoon, at which time and place there will be submitted to vote of the electors of said Village qualified to vote at said meeting, the following resolutions:

"RESOLUTION NUMBER ONE.

"*Resolved,* That the Board of Trustees of the Village of Canandaigua be and hereby is authorized to borrow on the credit of the Village of Canandaigua a sum not exceeding the sum of two hundred thousand dollars ($200,000) and to issue bonds of said Village therefor from time to time as the same may be needed for the purpose hereinafter specified, at the lowest obtainable rate of interest, and payable at such time or times as it may determine in conformity to the provisions of law applicable thereto, and that the same be issued and sold in all other respects in conformity to the provisions of Section 129 of the Village Law and of the General Municipal Law of the State of New York, and to expend the money so borrowed for the purpose of defraying the expense of grading and paving the streets of said Village in conformity to the provisions of Section 31 of Title 9 of the Village Charter. That a sum sufficient to pay the interest and principal of said bonds, as the same shall become due, be raised by an annual tax, as other taxes for general purposes in said Village are raised."

The notice calling the special meeting consisted of said resolution and the following addition: "Notice is hereby given that at the time and place above specified the foregoing resolutions will be submitted to vote by ballot of the qualified electors of the Village of Canandaigua, N. Y., entitled to vote at a tax meeting of said Village."

The notice composed as above (so far as material here) was duly published as provided by section 2 of title 7 of plaintiff's charter, already referred to. It will be observed, however, that the resolution did not comply with section 3 of said title in "specifying the purpose and the amount required, and whether it shall be raised in one sum or in annual installments, and if in annual installments, the number thereof and the amount of each." The resolution adopted

by the board of trustees and constituting the basis of the notice of the special tax meeting does not specify when or in what installments the bonds to be issued shall be paid. It does not, therefore, comply with the provisions of section 3 in this respect.

The learned counsel for the plaintiff, however, insists that the provisions requiring said details are not applicable to this case, because the preceding part of said section 3 provides that only those appropriations of money shall be deemed for a special purpose which are "not expressly included or in excess of the amount specified in section one of this title," and that section 1 provides that a general tax may be raised for the following purposes: "1. A sum sufficient to pay all installments of principal and interest on any bonded debt of the village of Canandaigua." He argues, therefore, that the vote for the issue of these bonds was an appropriation for general and not special purposes, and that, therefore, the provisions requiring the statement of the details referred to before any tax for a special purpose can be levied do not apply. The trouble with this argument, however, as it seems to us, is that the authority invoked for calling the meeting at which these bonds were voted for is found in the provisions of section 2, already quoted, that "the trustees of said village are hereby authorized and empowered to call a *special* tax meeting to vote upon appropriations for *special* purposes." It, therefore, follows that either the vote was for an appropriation for a special purpose requiring a statement in the notice of the meeting of certain details, which were not given, or else that the appropriation, not being for a special purpose, finds no authority in a meeting which could only be called to act upon appropriations for special purposes. Whichever view is adopted discloses to our mind a fatal objection to the validity of the proceedings whereby plaintiff sought for the authority to issue these bonds.

Perhaps it might be suggested, although it is not so done in plaintiff's brief, that the requirement for the statement of the details indicated is only applicable "before any *tax* for a special purpose can be levied," and that, therefore, without such statement, authority might be given for the original issue of the bonds, leaving the subsequent levying of taxes wherewith to pay the same subject to the limitations and conditions above referred to.

We do not think, however, that the various portions of sections

2 and 3 can be divorced from each other in any such manner as would be necessary in order to sustain any such possible claim. Section 2 provides for a special *tax* meeting. Section 3 defines an appropriation for a special purpose, and then, treating of the special tax which constitutes and makes effective the special appropriation, requires the resolution giving the details referred to. We do not think, if otherwise legal, that it would be possible to proceed to the issue of these bonds under portions of the sections quoted, while other provisions therein were disregarded. They relate to a single subject, and must be observed in their entirety.

Except for the restrictions contained in section 5 of the General Municipal Law, to which we shall hereafter refer, there are other provisions in plaintiff's charter, not referred to by its counsel, which we deem more available for the purpose of sustaining the validity of the proceedings under review than those called to our attention and which we have discussed.

Subdivisions 6, 7 and 8 of section 3 of title 3 of plaintiff's charter provide that the board of trustees shall be "authorized and fully empowered: * * *

"6. To give notice in the manner prescribed by this act * * * of all special tax meetings, which notice shall specify * * * the question or questions to be voted upon at any special tax meeting.

"7. To call special tax meetings in said village for such purposes, and at such times, as the interests of the village, in their judgment, shall require, due notice of any such meeting, and of the questions to be voted on thereat, being given as hereinbefore provided.

"8. To carry into effect every resolution adopted at any tax meeting of such village legally convened, which such meeting shall have authority to adopt."

Section 3 of title 2 (as amd. by Laws of 1894, chap. 131) provides that notice of any special tax meeting of the electors called by the board of trustees as above provided shall be given by publication in three newspapers printed and published in said village once in each week for three consecutive insertions next preceding such election.

These sections seem to us more broadly and appropriately to provide for a special meeting of taxpayers to vote upon such a question as the issue of bonds than those found in title 7 and cited by plain-

tiff's counsel. They also omit the requirement for details which we have already considered and held to be fatal to the validity of plaintiff's proceedings when resting upon sections 2 and 3 of title 7.

There are, however, certain requirements found outside of plaintiff's charter which in our opinion prevent the sections last quoted by us from being a sufficient authority for the proceedings in question as they were taken. Because these limitations are found in section 5 of the General Municipal Law (General Laws, chap. 17), and because plaintiff's counsel has referred to that section as in some way helping to give validity to the proceedings, we pass to its consideration.

It declares that "A funded debt shall not be contracted by a municipal corporation, except for a specific object, expressly stated in the ordinance or resolution proposing it; nor unless such ordinance or resolution shall be passed by a two-third vote of all the members elected to the board or council adopting it, or submitted to, and approved by the electors of the town or county, or taxpayers of the village or city when required by law. *Such ordinance or resolution shall provide for raising annually by tax, a sum sufficient to pay the interest and the principal as the same shall become due.*" The last clause is the one which we deem especially important at this point of consideration.

We have no doubt that the bonds proposed to be issued constituted a funded debt within the meaning of this section. (*People ex rel. Peene* v. *Carpenter*, 31 App. Div. 603.)

The resolution presented to and voted upon by the taxpayers contained, as its only compliance with the provision to which we have especially called attention, the following clause: "That a sum sufficient to pay the interest and principal of said bonds, as the same shall become due, be raised by an annual tax, as other taxes for general purposes in said Village are raised." There was nothing in the resolution which in any way fixed the time within which or the installments by which the bonds to be issued should become due. The only limitation upon this subject was the statutory one contained in section 129 of the Village Law that such bonds "shall become due within thirty years from the date of issue, and unless the whole amount of the indebtedness represented thereby is to be paid within five years from their date they shall be so issued as to provide for

the payment of the indebtedness in equal annual installments, the first of which shall be payable not more than five years from their date." The clause contained in the resolution quoted, therefore, did not either directly or indirectly by prescribing the terms of payment of the bonds fix within any reasonable limits whatever the amount which was to be raised each year by tax for the purpose of meeting these bonds. The query is, therefore, presented whether this requirement of section 5 of the General Municipal Law is met by the insertion, in the resolution voted upon by the taxpayers, of a clause which simply follows the general wording of the statute and gives no reliable or accurate information of the amount to be raised each year by tax, or whether it must be met by a resolution which, with details and specifications so far as possible, does authorize and provide for an annual tax with which to pay the amount that will each year become due upon the bonds for principal and interest.

It seems to us that the latter construction is the more reasonable and proper one. The statutes have been passed which compel trustees to go to the taxpayers for authority before they may issue such bonds as these, and we believe that such a construction should be placed upon these statutes as will compel the submission to the taxpayers of the information which will enable them to act and vote intelligently upon the propositions submitted. If the requirement of the General Municipal Law upon this point may be complied with by any such general clause as was inserted in plaintiff's resolution, we fail to see any object whatever for it. Other provisions having given authority to issue the bonds, it would necessarily follow that installments of principal and interest would have to be met by the proper assessment and levying of taxes from year to year as they became due, and nothing was gained by a provision expressly authorizing such taxation. It would follow as a matter of course and necessity. If, upon the other hand, this provision be construed as requiring the resolution submitted to the taxpayers to state with reasonable detail how the bonds were to be paid and how much would be required each year by taxation to meet them, we can easily see some force in the statute. We believe it was intended to require the submission of such details as far as practicable in order to enable the taxpayers to vote intelligently. If we apply this construction to the facts of this case, it will be seen that it would have

secured for the taxpayers in voting upon these bonds considerable light which was not given to them. They voted to have an issue not exceeding $200,000, and, therefore, they knew and were forewarned what would be the limit of liability in this respect. Section 129 of the Village Law provided that these bonds should not bear to exceed a certain rate of interest and should not be sold for less than par, and, therefore, they knew the limitations of what they might expect in this respect. When, however, it came to the important feature of the time within which the bonds should be paid and the amount of the annual tax with which to meet them, nothing was said and no light was given by the trustees. They might be made payable within five years or they might be extended over a period of thirty years. A taxpayer might be largely influenced in his vote upon such question by the terms as to time upon which the bonds were to be made payable. He might naturally feel that if this payment was to be extended over a considerable length of time in reasonable installments the bonds should be authorized, and might feel, upon the other hand, that if they were to be paid within one or five years the burden would be too onerous to be undertaken. We think that the ordinary conception of such bonds would be based upon the theory of their extending over a good many years. As a matter of fact, and as they had a perfect right to do if the resolution offered was legal, the trustees have seen fit to make the bonds payable within five years, and it follows that the taxpayers, without being advised of it and perhaps not anticipating or expecting such result, have laid the foundation for an annual tax levy of over $40,000 in the village of Canandaigua in order to meet these bonds. It is possible that they would with full knowledge prefer to authorize such course, but we feel quite sure that the clause under review should be so construed as to have secured to them at the time they voted knowledge of what they were voting upon in this respect. We think that the clause in the resolution intended to meet the requirement in the statute should have indicated the installments in which the bonds were to be made payable, and which were to be met each year. This information, coupled with the statutory limitations relating to the issue of bonds already referred to, would have given the taxpayers reasonably definite information as to the size of the burden which each year's tax budget would carry, and

under these circumstances a vote to raise each year a sum sufficient to pay the installments due upon the bonds would have been an intelligent one and under conditions which fulfilled the spirit as well as the language of the statutory provisions.

These views lead to the conclusion that judgment must be entered determining that the bonds in question are not valid and legal obligations of plaintiff and that defendants' bid and award be terminated and held for naught, and that their certified check heretofore deposited be returned to them, with costs.

All concurred.

Judgment directed in favor of defendants, determining that the bonds in question are not valid and legal obligations of the plaintiff and that the defendants' bid and award be terminated and held for naught and that their certified check heretofore deposited be returned to them, with costs.

JOSEPH C. HOFFART, Respondent, v. THE TOWN OF WEST TURIN, Appellant.

Negligence — liability of a town for injury resulting from a horse being frightened by a stick of wood falling from a wood pile on the edge of a highway.

Assuming that a pile of ordinary stove wood, two feet high and from seven to ten feet in diameter, lying from seven to ten or eleven feet from the edge of a little traveled country highway, is calculated to frighten horses driven along the highway, and that the pile of wood has remained there long enough to charge the commissioner of highways with knowledge of its presence, the town is not liable for damages sustained by a person driving along the highway whose horse runs away in consequence of being frightened, not by the general aspect of the wood pile, but by the sudden and unexplained falling of a stick therefrom.

APPEAL by the defendant, The Town of West Turin, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Lewis on the 17th day of April, 1903, upon the verdict of a jury for $500, and also from an order entered in said clerk's office on the 15th day of April, 1903, denying the defendant's motion for a new trial made upon the minutes.

C. S. Mereness, for the appellant.

M. H. Powers, for the respondent.

HISCOCK, J.:

This action was brought to recover damages alleged to have been sustained by plaintiff in September, 1901, through being thrown out of his wagon as he was driving upon a highway in the defendant town, and which accident resulted, as claimed, through his horse becoming frightened at a pile of wood upon the side of the highway and running away.

We think that the evidence taken in its entirety was not sufficient to charge defendant with liability, and that, therefore, the judgment should be reversed.

Upon the occasion in question plaintiff was driving a single horse hitched to a buggy in which were himself, his wife and three children. It was in the daytime, and his course lay over a country highway which was very little traveled, not to exceed two teams a day passing over it, even in the summer season. Some time before the accident an owner of land adjoining the highway had started to draw out some wood, and in the course of his operations had left a pile of ordinary stove wood, not to exceed two feet high and from seven to ten feet in diameter, at a distance variously estimated at from seven to ten or eleven feet from the edge of the highway. There were some cradle knolls and weeds by the side of the highway in the neighborhood of this pile of wood, and plaintiff claims that as he drove along he did not see the wood pile until his horse got opposite to it, when a stick or slab slipped down upon the pile and frightened the horse. It is to be noticed that plaintiff's evidence makes it entirely distinct that the fright of the horse was caused by the sudden slipping of this stick, and that there was nothing to cause this sudden contingency, except, as plaintiff suggests, the jarring of the earth as he was driving his horse and buggy along an ordinary country highway several feet distant therefrom.

There was some evidence that this horse had run away before this, and that after the accident somebody led him back over the pile of wood without any struggles upon his part. There was also evidence which would have permitted a jury to say that three or four other horses, upon occasions prior to this accident, had shied at

the pile of wood, but none of them had run away. There was evidence that the miles of highway in the town aggregated about seventy-five.

While it is somewhat difficult to believe that a small pile of ordinary stove wood would so frighten horses when properly driven that they would shy and run away, it was perhaps within the province of the jury to find that this particular pile of wood did possess these possibilities and that it was calculated to frighten horses. It was also permissible for the jury to find that the pile of wood had remained there long enough so that the commissioner of highways should have known of its presence. If, therefore, plaintiff's horse had simply taken fright at this pile of wood and run away, we might have felt constrained to allow the verdict to stand. Such, however, is not the case presented upon this appeal. As stated, it clearly appears that plaintiff's horse was frightened, not by the general aspect of the wood pile, but by the sudden and unexplained slipping and falling of a stick as he went by. It is suggested that plaintiff's horse and wagon so jarred the earth that it shook down this stick, but we do not feel able to go to the extent of accepting this theory. It, therefore, follows that suddenly and without any sufficient explanation or cause as plaintiff was driving by, a stick of wood fell down and frightened his horse and caused the accident. We think that this occurrence was so unusual that the commissioner of highways was not bound to anticipate it or guard against it. If the wood had been newly thrown into the pile it would be easier to understand the settling and falling of its component pieces. It had, however, lain there for weeks or months, and the alleged cause of plaintiff's misfortune seems to have been something which could not be reasonably anticipated or foreseen.

For these reasons we think the judgment and order should be reversed and a new trial granted.

All concurred.

Judgment and order reversed and new trial ordered, with costs to the appellant to abide event, upon questions of law only, the facts having been examined and no error found therein.

DAVID AUSTIN, Respondent, v. FRANK BARKER, Appellant.

Seduction — claimed to have been accomplished by putting the victim in a hypnotic condition — proof should be given showing that it is possible to create such a condition.

Upon the trial of an action for the seduction of the plaintiff's daughter, who was delivered of a fully-developed child in August, 1901, the only evidence tending to show that the defendant had had improper relations with the plaintiff's daughter was given by the daughter herself. She testified that the improper relations commenced October 30, 1900, and continued until January 1, 1901; that all the improper acts occurred in her father's house in a room which was separated by an ordinary door from a room in which her mother or father usually sat. In speaking of the first of these occasions she testified that the defendant made an improper proposal to her which she indignantly rejected; that they then sat and talked a few minutes, after which the defendant forcibly took her and placed her upon a couch and accomplished his purpose; that she resisted and struggled, but did nothing to attract the attention of her parents, one or both of whom were in the adjoining room.

The defendant denied his guilt, and gave testimony tending to show that he was at other places on some of the occasions when the plaintiff claimed that he was with his daughter. The defendant also testified that although he lived near the plaintiff no suggestion that he was responsible for the condition of plaintiff's daughter was made until many weeks after the birth of the child.

The plaintiff's daughter, when under examination by the defendant's attorney, testified that she was entirely unconscious of defendant's various acts of relation with her at the various times when the same were occurring; that she did not know and was unaware that they had occurred during the entire term of her pregnancy and down to a period of several weeks after the birth of her child; that upon the first occasion of improper conduct she simply realized and understood what was taking place up to the time the defendant placed her upon the couch; that in October, 1901, she was visited by the plaintiff's attorney, and as the result of what then occurred her mind was so influenced and awakened that it grasped a recollection or consciousness of defendant's acts with her in the fall of 1900, so that from that time on down to and including the trial she had a present knowledge and recollection that the defendant had committed with her acts resulting in her seduction and childbirth.

It also appeared upon the trial that during the period in 1900 under review the complainant had made entries in a diary which mentioned the defendant and contained references which were assumed to relate to and be based upon his visits to her and various results flowing therefrom. Subsequently she had no consciousness of having made these entries, but upon the occasion of the visit of the attorney aforesaid, and without knowing it, she procured the diary and gave to him various of these entries. After this visit she also became aware

of having made the entries in the diary at the times of the various occurrences therein referred to.

The plaintiff's daughter testified that defendant hypnotized her and so made her unconscious of his unlawful acts with her at the time they were occurring, and that this condition of unconsciousness thereof continued until the plaintiff's attorney visited her, nearly a year afterwards, and again placed her in a hypnotic condition, through and by means of which her consciousness was so restored that it seized hold of events of which she had theretofore been unconscious.

Held, that the explanation given in behalf of the plaintiff's case was opposed to ordinary experience and knowledge;

That if the plaintiff relied upon some science and theory not generally known or understood, he should have introduced competent evidence tending to sustain the probability or possibility of the existence of what he claimed;

That, as he had not done this, the evidence that the plaintiff's daughter had been in a hypnotic condition at certain times in the year 1900 whereby she was made unconscious, and again in 1901 whereby she was made conscious, of certain events, should be rejected;

That, with this evidence out of the case, there was not sufficient evidence left therein to sustain a verdict in favor of the plaintiff.

APPEAL by the defendant, Frank Barker, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Oneida on the 30th day of March, 1903, upon the verdict of a jury for $2,000, and also from an order entered in said clerk's office on the 7th day of April, 1903, denying the defendant's motion for a new trial made upon the minutes.

L. M. Martin and *Thomas S. Jones*, for the appellant.

D. F. Searle, for the respondent.

HISCOCK, J.:

This action was brought by plaintiff to recover damages claimed to have been suffered by reason of the seduction of his daughter, Edith Austin, by the defendant.

Plaintiff with his family, including said daughter, and the defendant resided upon nearby farms in one of the towns of Oneida county. The daughter and the defendant had been schoolmates and acquaintances for many years. In August, 1901, the daughter, being unmarried, gave birth to a child of full development. She was at that time about twenty-two years of age and the defendant was of about the same age. It was claimed upon the trial that upon various dates commencing upon October 30, 1900, and extending to

about January 1, 1901, the defendant had had improper relations with the daughter which resulted in the subsequent childbirth. The only evidence directly tending to prove the unlawful acts was given by the daughter. She testified that they all occurred in a room in her father's house upon various evenings when defendant visited her there. This room was situated next to and separated only by an ordinary door from another room in which her father or mother or both were ordinarily present at the time when defendant was with her. Speaking of the first of these occasions of improper conduct with her, she testified in effect that it was in the evening; that defendant came to the house and with him she went into the room mentioned where after awhile he laid down upon a couch and slept; that thereafter he got up and made an improper proposal to her which she indignantly rejected, whereupon they sat and talked for a few moments; that then the defendant forcibly took her and placed her upon the couch and accomplished his purpose; that she resisted and struggled, but did nothing to attract the attention or assistance of her parents, one or both of whom were then in the adjoining room.

The defendant, who was called as a witness in his own behalf, absolutely and unqualifiedly denied his guilt and responsibility for the daughter's condition, and at considerable length gave testimony to the effect that he was at other places and with other persons upon some, at least, of the occasions when plaintiff claimed that he was present with his daughter.

Various witnesses were called upon each side to give evidence mainly relating to the whereabouts of the defendant upon various occasions as tending to corroborate and support the plaintiff's complaint or the defendant's defense, respectively. Most if not all of them were in some way related to one of the parties, and they were, therefore, more or less interested in the event of the trial in which they participated.

Defendant testified, and we nowhere fina any contradiction of him in this respect, that notwithstanding their close proximity no complaint or suggestion was ever made by plaintiff or any one in his behalf that he, defendant, had been guilty of improper conduct with the daughter or was responsible for her condition until many

weeks after the birth of the child, when he received a letter from an attorney.

While some of the circumstances in the case thus briefly outlined are somewhat unnatural, they perhaps are not so extraordinary that we should feel justified in refusing to accept and abide by the verdict of the jury upon them, if there were nothing else to be considered. Other evidence, however, to which we shall now refer, was given upon the trial of so unusual a character that we feel unwilling to allow the verdict to be based upon it.

After the daughter had been quite extensively examined both on behalf of the plaintiff who called her and by counsel for the defendant, and had left the stand, she was, upon the urgent request of the defendant's counsel, predicated upon new information received by him, recalled and examined. She then in effect testified that she was entirely unconscious of defendant's various acts of relation with her at the various times when the same were occurring; that she did not know and was unaware that they had at all occurred during the entire term of her pregnancy and down to a period of several weeks after the birth of her child; that upon the first occasion of improper conduct she simply realized and understood what was taking place up to the time the defendant placed her upon the couch; that in October, 1901, she was visited by the plaintiff's attorney, and as the result of what then occurred her mind was so influenced and awakened that it grasped a recollection or consciousness of defendant's acts with her in the fall of 1900, so that from that time on down to and including the trial she had a present knowledge and recollection that the defendant had committed with her acts resulting in her seduction and childbirth.

It also appeared upon the trial that during the period in 1900 under review the complainant had made entries in a diary which mentioned the defendant and contained references which were assumed to relate to and be based upon his visits to her and various results flowing therefrom. Subsequently she had no consciousness of having made these entries, but upon the occasion of the visit of the attorney aforesaid, and without knowing it, she procured the diary and gave to him various of these entries. After this visit she also became aware of having made the entries in the diary at the times of the various occurrences therein referred to.

The jury were invited to, and, judging from their verdict, apparently did enter the rather unknown and uncertain realms of hypnotism in search of an explanation for this remarkable experience and testimony of plaintiff's chief witness. She testified, and it then was and now is claimed, that defendant hypnotized her and so made her unconscious of his unlawful acts with her at the time they were occurring, and that this condition of unconsciousness thereof continued until her father's attorney visited her, nearly a year afterwards, and again placed her in a hypnotic condition, through and by means of which her consciousness was so restored that it seized hold of events of which she had theretofore been unconscious.

We do not feel called upon to discuss or determine the rather shadowy boundaries of hypnotism or its possibilities in explaining and accounting upon legal trials for what otherwise might fairly be considered as incredible. It is suggested by plaintiff's counsel upon this appeal that we may judicially recognize, as a matter of ordinary experience and knowledge, that the abnormal physical conditions and changes which precede childbirth are frequently accompanied by a corresponding mental disturbance, including loss of memory.

If we should accept this suggestion it would not explain that which confronts us in this case, for plaintiff's witness did not for a period lose recollection of things theretofore lodged in her mind, with subsequently recurring memory. Through an alleged peculiar mental condition she became conscious and aware of events of which she had never before been at all conscious.

We are, therefore, thrown back upon plaintiff's explanation and theory of hypnotism, and it suffices to apply to it the ordinary rules of evidence and common sense. The explanation given in behalf of plaintiff's case is opposed to ordinary experience and knowledge. If, as explanatory thereof, plaintiff relied upon some science and theory not generally known or understood it was proper for him to give the jury the light of some competent evidence tending to sustain the probabilities or at least possibilities of what was claimed. Nothing of this kind was done upon the trial unless there may have been read then, as upon this appeal, the unverified statements and opinions of certain authors. We are unwilling to accept them or the otherwise unconfirmed statements of the witness that at certain times in 1900 she was placed in an hypnotic condition whereby she

was made unconscious, and again in a similar condition in 1901, whereby she was made conscious of certain events. The rejection of this evidence leaves this case in our opinion without sufficient testimony upon which to rest the burden carried by plaintiff to properly establish his case and sustain the verdict of the jury.

It is urged by plaintiff's counsel, as tending to show the truthfulness of the witness, that nothing but honesty could have prompted her to give this evidence, and that if she had been untruthful she would have suppressed her statements upon this subject. It is, perhaps, not worth while to consider at any length this aspect of the testimony. It merely may be suggested that the failure for over a year to make any complaint against defendant as the author of the misfortune of plaintiff's daughter was somewhat strange unless explained in some manner, and that such explanation was furnished by the testimony as to the daughter's condition if true.

Various exceptions were taken by the defendant to the reception and exclusion of evidence and to refusals by the learned trial justice to charge, which we do not consider in view of the conclusions reached upon the questions discussed.

The judgment and order should be reversed upon the ground that the verdict was against the weight of evidence.

All concurred.

Judgment and order reversed and new trial ordered, with costs to the appellant to abide event upon questions of fact.

SUSANNAH E. WHITE, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Negligence — finding that a fire was caused by a spark from a passing engine — judicial notice that the escape of sparks cannot be entirely prevented — evidence that other locomotives of the same company have emitted sparks.

Semble, that evidence that a house was situated forty or fifty feet distant from a steam railroad and that upon the forenoon of a June day during an exceedingly dry period a fire was discovered in the roof of the house upon the side toward the railroad; that about fifteen minutes before the discovery of the fire a locomotive drawing a passenger train had passed the house; that the wind was

blowing toward the house and that there had been no fire therein for some time, is sufficient to enable a jury to draw the inference that the fire was started by a spark from the locomotive.

The court will take judicial notice of the fact that a locomotive cannot be so constructed as to prevent entirely the escape of sparks, and, in order to render a railroad company liable for damages caused by a fire ignited by a spark from one of its locomotives, it must appear that the railroad company negligently omitted to fit its engines with appliances which would prevent the escape of sparks of an unusual size or in unnecessary quantities and that it was this negligence which caused the fire.

While it is the rule that, for the purpose of establishing negligence in the construction of the locomotive, alleged to have caused the fire, evidence may be given generally that locomotives belonging to the same railroad company had on other occasions discharged sparks of an unusual size or in unnecessary quantities, such evidence will not prevail as against testimony given by disinterested witnesses, of their own personal knowledge, that the locomotive in question was in proper condition at the time the fire occurred.

APPEAL by the defendant, The New York Central and Hudson River Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Oswego on the 27th day of April, 1903, upon the verdict of a jury for $733, and also from an order entered in said clerk's office on the 11th day of April, 1903, denying the defendant's motion for a new trial made upon the minutes.

Thomas Burns, for the appellant.

J. W. Shea, for the respondent.

HISCOCK, J.:

This action was brought by plaintiff to recover the value of a house and of certain personal property destroyed by a fire which it was claimed was caused by a spark negligently permitted to escape from one of defendant's passing engines. Various grounds of negligence were alleged in plaintiff's complaint, but the learned trial justice before whom the case was tried permitted a recovery solely upon the ground that the spark arrester in the engine was not in proper condition and that defendant had not used proper care in inspecting it.

We think that the evidence did not warrant the verdict which the jury rendered and that the judgment appealed from must be reversed.

The jury were entitled to find the following among other facts, some of them upon disputed evidence:

Plaintiff owned a house which was situated between forty and fifty feet away from defendant's road. Upon the forenoon of June 15, 1900, during an exceedingly dry period, a fire was discovered in the roof of the house upon the side in whole or part toward the railroad. About fifteen minutes before this discovery an engine had passed upon defendant's road drawing a passenger train. The wind was blowing toward the house and there had been no fire in the latter for some time. As stated, some of these facts were sharply disputed, but we think there was sufficient evidence to permit a jury to find them as stated. From them, certainly if standing by themselves, it probably would have been permissible for the jury to draw the inference that the fire was ignited by a spark from the engine. If, however, we assume that such inference might be and was drawn by the jury, it still would not necessarily follow that the defendant was legally liable for the fire or the damages which resulted therefrom. It had the right to run its engines over its road, and we may take judicial notice of the fact, even if it does not appear in the evidence, that no engine can be so constructed that some sparks will not escape, and a railroad only becomes liable when it has negligently used engines not so fitted with appliances as to prevent the escape of sparks of an unusual size or in unnecessary quantities. (*Brown* v. *Buffalo, Rochester & P. R. R. Co.*, 4 App. Div. 465.)

The burden, therefore, rested upon plaintiff to establish not only that her house was set on fire by a spark from defendant's engine, but that defendant was guilty of negligence in not having a proper spark arrester in its engine, and that on account of such negligence sparks were emitted which caused the fire. We think it is in this respect that she has failed to sustain the burden imposed upon her.

There was no evidence which tended directly to establish that the locomotive which passed before the fire and which must have caused it, if any did, was in a defective condition. No witness either testified that he had examined the spark arrester and found it defective or that he had seen sparks escaping of such a size and in such quantities as might properly sustain the inference that it was out of order. One witness was called apparently for the purpose of

establishing that the arrester described by the defendant's witnesses upon the trial as in use upon this engine at the time of the accident was not of a suitable character. We think, however, that his evidence failed in this respect and, moreover, the trial justice distinctly held that no such ground of negligence and cause of recovery was established in the case.

The plaintiff attempted to cover this branch of her case by showing that, at various times during the month preceding the fire, various engines of defendant had been seen to throw out sparks of larger sizes and in larger quantities than should escape through a proper spark arrester, and that some of these sparks were thrown as far as plaintiff's house. None of this evidence identified the engine in question. It was all very general in its character and did not describe with any definiteness whatever the conditions of grade and load under which the engines threw out the sparks. It is perfectly well understood that engines of different sizes and construction under different strains of drawing trains will produce very different results in the matter of throwing sparks. An engine laboring with a steep grade or under a heavy load will throw out a much greater quantity of sparks than one being operated under opposite conditions. General evidence of the character described is at best of uncertain value in determining the condition and operations of a specified engine at a particular time and place unless some similarity of conditions is shown to have existed. (*O'Reilly* v. *Erie R. R. Co.*, 72 App. Div. 228, 231; *Flinn* v. *N. Y. C. & H. R. R. R. Co.*, 142 N. Y. 11.)

While the rule laid down in *Sheldon* v. *Hudson River R. R. Co.* (14 N. Y. 218), that for the purpose of establishing negligent construction of a specified engine, evidence may be given generally that engines belonging to the same railroad at other times had discharged an unjustifiable quantity or size of sparks, seems to be established, there does not appear to be any tendency in the latter cases to enlarge the operations or application of such rule.

In this case, however, we are not compelled or permitted to settle the question of defendant's liability solely by reference to what had occurred upon other occasions than that under investigation in the case of other locomotives. There is evidence which, in our opinion, rebuts any presumption which might be raised as to the engine in

question on account of the manner in which others had been operated at other times. As already stated, no witness speaking with reference to the locomotive under investigation gave testimony to the effect that it was out of condition. Upon the other hand, various witnesses, of their personal knowledge, testified to its proper examination and inspection and to its proper condition at the time when the fire occurred. They, however, were witnesses in the employ of the defendant. But outside of them and supplementing their evidence, various witnesses, some of them called and, therefore, vouched for by the plaintiff, and others entirely disinterested as between the parties, testified that they saw this engine upon the occasion in question at or near the point of passage by plaintiff's house, and that it was not throwing out any improper discharge of sparks. One Smith, a witness called by the plaintiff, testified that he was at work upon the track 400 or 500 feet from plaintiff's house; that he saw the engine as it passed by and did not see any sparks or coals coming from it. Alvin Tanner, Emma Bowers, a sister of the plaintiff, Frank Bowers, not in the employ of the defendant at the time of the trial, gave evidence to the same effect. Moreover, plaintiff herself, who testified with considerable particularity to the passage of the engine, stated that she did not observe the emission of any sparks. While it may be urged that these witnesses did not pay such particular attention to this subject at the time as to be able to say that no sparks escaped from the engine, we still think that we should not be justified in permitting a jury to find in spite of their testimony that there was such an unusual and unlawful emission of sparks as to indicate that defendant's engine was in imperfect condition so as to make it liable for plaintiff's mishap.

In those cases cited by the learned counsel for the respondent, as authority for the proposition that a jury might find a defective condition in one engine from what engines not identified with the one in question had done upon other occasions, there was no such evidence as that above referred to speaking directly of and concerning the occasion under investigation. The class of evidence permitting a jury to predicate a negligent condition of one locomotive upon the operations of others at other times, is at variance with the rules of evidence ordinarily applicable to a case of this character, and as the leading case of *Sheldon* v. *Hudson River R. R. Co.*, cited

supra, clearly indicates has been allowed largely as a matter of necessity. We think that it would be an unwarranted extension and application of the rule to allow such evidence to be made the basis of liability in the presence of other evidence given by disinterested witnesses directly indicating that there was an entire absence of fault and negligence.

These views lead us to the decision that the judgment should be reversed and render it unnecessary for us to discuss various other questions pressed upon our attention by the counsel for the appellant.

All concurred.

Judgment and order reversed and new trial ordered, with costs to the appellant to abide event, upon questions of law only, the facts having been examined and no error found therein.

MINNEAPOLIS TRUST COMPANY, Appellant, *v.* HELEN MATHER, Respondent.

Collateral — obligation of the creditor in enforcing it — his duty to account where he purchases it at a judicial sale — his duty as agent — his duty as trustee for the owner.

In December, 1886, Helen Mather, a resident of the State of New York, received from one Whitney, of St. Paul, Minn., notes aggregating $20,100, secured by five several mortgages made by Whitney upon lands situated in Minnesota. In 1889 Mather sent the notes and mortgages to the Minneapolis Trust Company for the purpose of collection and remittance.

In 1890 the trust company loaned to Mather $5,000 upon her note for that amount. On the same day Mather assigned and transferred to the trust company, as collateral security for the note, the Whitney notes and mortgages.

In June, 1890, Whitney conveyed the lands covered by the mortgages to one Van Dyke, who assumed and agreed to pay, as part of the purchase price, the mortgages executed by Whitney and the notes secured thereby. A portion of the mortgaged premises had also been purchased by two persons named Sumbardo and Horr, and they paid interest upon the notes at various times.

Subsequently, Sumbardo and Horr having failed to continue their interest payments, and there being a large amount of unpaid taxes against the property, correspondence was had between the trust company and Mather with respect to the foreclosure of the mortgages. Mather was also represented in Minnesota by one Atwater, and at some time between June 20, 1894, and July 5, 1894, Atwater, pursuant to instructions from Mather, had an interview with the trust company and informed it that there was no other course to pursue

except to foreclose the mortgages as soon as possible, bid in the property for somewhere near its present value and take judgment against the makers for any deficiency.

July 16, 1894, the trust company commenced proceedings to foreclose the mortgages, and on September 5, 1894, purchased the mortgaged property for $24,434.35, which sum represented the full amount due upon the Whitney notes, together with the costs of foreclosure. Mather was not made a party to the foreclosure proceedings and had no notice thereof until they had been completed.

The land covered by the mortgages was worth about $20,000 at the time of the sale. Mather's total indebtedness to the trust company on the day of the sale amounted to $6,699.31. No attempt was made to collect the amount of the notes from Whitney, or from Van Dyke, who had assumed the payment of the notes and mortgages.

Held, that when the trust company made the loan to Mather, and received as collateral security for such loan the notes and mortgages which it had formerly held as agent, a new relation was created which entitled the trust company to manage the securities for its own benefit to the extent of protecting its interests as pledgee;

That such relation imposed upon the trust company the duty of caring for the property to such an extent as not to jeopardize or injure Mather's interest therein beyond the extent necessary to the enforcement and conservation of its own interests in the property;

That when the trust company's interests were satisfied out of the property, any balance remaining was held by it in trust for Mather's benefit, and that she might compel an accounting in respect thereto;

That, whether the trust company acted as Mather's agent or as Mather's trustee, it was bound to exercise reasonable care and diligence and to refrain from unnecessarily injuring her, and that if it departed either from Mather's instructions when acting as her agent, or from its duty as trustee when trying to conserve its own interests, it was liable to account for its acts to Mather.

That Atwater's instructions to the trust company to "foreclose the mortgages as soon as possible, bid in the property for somewhere near its present value, and take judgment against the makers of the notes for any deficiency there might be," could not be construed into an authority to bid in the property for the full amount of the notes and thereby discharge the maker and the person who had assumed the payment of the notes as a consideration for the deed;

That the trust company had the right, either to follow the plan suggested at the conference with Atwater, or to act independently and purchase the property itself and account to Mather for the proceeds;

That having elected to purchase the property itself, and having paid a price in excess of the one suggested or agreed upon, it became liable as a purchaser for its own benefit and was bound to account to Mather to the extent of the purchase price as though the property had been sold to a third person for the amount of the trust company's bid.

HISCOCK and SPRING, JJ., dissented.

APPEAL by the plaintiff, the Minneapolis Trust Company, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Jefferson on the 31st day of May, 1902, upon the report of a referee, with notice of an intention to bring up for review upon such appeal an order entered in said clerk's office on the 27th day of March, 1902, awarding an extra allowance of costs, and also an order entered in said clerk's office on the 16th day of June, 1902, denying the plaintiff's motion for a retaxation of costs.

Selden Bacon and *Elon R. Brown*, for the appellant.

M. H. Merwin and *Levi H. Brown*, for the respondent.

STOVER, J.:

This action was brought to recover upon a note for $5,000 and interest, and the sum of $2,298.60 for moneys loaned and advanced.

The defendant does not dispute her indebtedness upon the notes, nor for moneys loaned, but seeks an accounting, and sets up a counter claim of $14,000 and interest. There is very little, if any, dispute as to the facts in the case, the error alleged, being based upon the conclusions of law by the referee.

The defendant is a resident of this State, and the plaintiff is a corporation, organized and doing business in the State of Minnesota.

In December, 1886, the defendant received from one Whitney, of St. Paul, Minn., several notes, aggregating $20,100, and secured by five several mortgages, made by said Whitney, upon lands situate in the State of Minnesota. On the 24th of October, 1889, the defendant left the notes and mortgages above described, and of which she was still the owner, with the plaintiff, for the purpose of collection and remittance to the defendant by the plaintiff. The interest was collected by the plaintiff and remitted to the defendant down to April, 1891.

On the 18th day of December, 1890, the plaintiff loaned to the defendant $5,000, taking therefor her note for that amount, and on the same day the defendant assigned and transferred to the plaintiff as collateral security for said notes, the five mortgages above mentioned, together with the notes and obligations therein described; the assignment being the usual one, by which the defendant constituted the plaintiff her attorney to collect, and take all lawful

means for the recovery of the money and interest, and said assignment was duly recorded in the proper county in the State of Minnesota.

The plaintiff collected at different times interest on the notes of Whitney, the same being paid by two persons, Sumbardo and Horr, who had purchased the property covered by the mortgages, or some part thereof.

In June, 1890, Whitney, the mortgagor of the premises, conveyed the lands covered by the mortgages, together with other lands, to one James Van Dyke, subject to the said mortgages and the notes secured thereby, and which James W. Van Dyke thereby agreed to pay, according to the respective tenors thereof, as part of the purchase money for the property. The conveyance was duly recorded.

Sumbardo and Horr having failed to pay the interest on the notes, no interest having been received for some time, there being a large amount of unpaid taxes against the property, considerable correspondence was had between the defendant and plaintiff as to the best method of procedure and with respect to the foreclosure of the mortgages.

The defendant was also represented by one Atwater, residing in the city of Minneapolis, and who had various consultations with the plaintiff as to the best manner of proceeding for the purpose of protecting the interests of the defendant, and on the 18th of June, 1894, the defendant wrote the plaintiff that she had instructed Atwater to see the plaintiff about the Horr and Sumbardo notes and mortgages, this being the designation generally used for the five Whitney notes and mortgages above mentioned, and asking if something could not be done whereby a judgment for past due interest, or a lien on some real estate which they might have, could be obtained, and requesting it to give all information to Mr. Atwater and confer with him as to the best method of procedure.

On the 20th of June, 1894, the plaintiff answered this letter of defendant by saying that they thought the course pursued to get all the interest possible out of Sumbardo and Horr, by delaying foreclosure, had been the wisest, and stated that they could foreclose the mortgages and sell the property for one-half or two-thirds of the notes and get judgment against them for the balance, if the defendant

desired; that it did not believe such judgment would be worth much; that it would talk with Mr. Atwater as suggested.

After the 20th of June, 1894, and before the 5th of July, 1894, the said Atwater saw the plaintiff in the interest of the defendant, and told it that there was no other course to pursue, except to proceed to foreclose the mortgages as soon as possible, bid in the property for somewhere near its present value, and take judgment against the makers of the notes for any deficiency there might be.

On the 16th day of July, 1894, foreclosure of the five mortgages above mentioned was commenced by plaintiff by the publication of a notice of sale, dated on that date, under the statute of the State of Minnesota. The property described in the mortgages was sold on the 5th day of September, 1894, by the sheriff of Ramsey county, Minn., to the plaintiff, and certificates thereof given to said plaintiff as purchaser, the aggregate bid for the five pieces of property being $24,434.35, and for which sum the premises were sold to the plaintiff, this sum being the full amount which was due upon the notes in question, secured by the respective mortgages given, with the costs of foreclosure of each of said mortgages respectively.

The defendant was not made a party to the foreclosure, and had no notice of the foreclosure until after the same was completed.

The land covered by said mortgages at the time of sale was worth about $20,000. The amount due the plaintiff on the note of $5,000, made by the defendant, on the day of sale, was $5,886.66, and the amount due for services and money advanced at the same date was $812.65, making a total indebtedness of defendant to plaintiff of $6,699.31.

No suit was ever commenced on the notes made by said Whitney, nor was any attempt made to collect the same of him, and there was no evidence of any suit being commenced against James W. Van Dyke, or of any attempt made to collect the amount of said notes from said James W. Van Dyke, grantee in the deed before mentioned, and who had assumed the payment of said notes and mortgages.

The referee found that the plaintiff was negligent in the collection of said collateral notes and mortgages, in causing the mortgaged premises to be sold at the full amount due on the respective

securities, and thus releasing from all liability on the same the said Whitney, the maker of the said notes, and the said Van Dyke, the grantee of said premises, who had assumed the payment of the same.

There is in this case an element of conversion, that is, of placing the property where it cannot be restored to defendant, and where plaintiff has the benefit of its sale. This is quite different from a case in which defendant might disaffirm and recover her property. (*Scott* v. *Rogers*, 31 N. Y. 676; *Laverty* v. *Snethen*, 68 id. 522; *Comley* v. *Dazian*, 114 id. 161.) Plaintiff, acting for itself, had the right to buy at any price, but its action deprived defendant of all right in the property mortgaged and all remedies against the makers of the notes. She cannot be restored to her former position, and is left to her accounting with or proceeding against plaintiff as her remedy.

The referee found, as a conclusion of law, that there had been a conversion of the Whitney notes and mortgages by the plaintiff, and rendered judgment against the plaintiff in favor of the defendant for the amount of the securities, less the sum of $6,699.31, due from defendant to plaintiff upon her note, and for moneys advanced, together with the interest on said sum from September 5, 1894.

Although the record is a voluminous one, the controlling facts upon which the case may be said to depend are within a narrow compass, and in order to deduce the proper conclusion it will be profitable to consider briefly the relations of the parties and their legal rights and duties.

During the time that the plaintiff held the securities for collection, its duties were clearly that of an agent of the defendant for the purpose of receiving the interest due upon the notes and mortgages and remitting to the defendant; and had this been the only relation which the plaintiff had borne to the defendant, the questions now under consideration would, in all probability, never have arisen. But when the loan was made by the plaintiff to the defendant, and it received as collateral security for that loan the mortgages and notes which it had formerly held as agent, a new relation was created, in which the plaintiff had the further right to handle the securities for its own benefit, to the extent of protecting its own interest as pledgee of the property. On the other hand, it owed to defendant the duty of caring for the property to such an extent as

not to jeopardize or injure her interest therein, beyond the extent that it might be necessary to conserve and enforce its own interests and rights in the property. And, beyond its own interest in the property, it had the further duty to see that the defendant was not injured by its act in reference to the property. Its interests being satisfied out of the property, it was subject to an accounting to the defendant, and any balance remaining after the satisfaction of its claim was held by it in trust for the benefit of the defendant. In either capacity, whether as agent for the defendant and acting under its direction, or as a trustee, who was bound to act in good faith in the protection of its own rights, and in so doing to not unnecessarily injure the defendant, it was bound to exercise reasonable care and diligence; and if it departed, either from the instructions of its principal when acting as agent, or from its duty as trustee when trying to conserve its own interests, it was liable to account for its acts to the defendant either as principal or *cestui que trust.*

The plaintiff, so far as it can be claimed that it was acting under the direction of the defendant, must find its authority in the instructions of Atwater on the 20th of June, 1894. While the finding of the referee is as to the fact as to what occurred, without drawing conclusions, and perhaps the deduction might be made that there was simply a conference, and the conclusion that in the interests of all of the parties the course there stated was the best one to pursue, yet, assuming that the statements then made were sufficient to authorize the plaintiff to act as the agent of the defendant at that time, it must be held to have authority only in accord with the instructions there given, and if it is to be construed as an instruction, that instruction would be to "foreclose the mortgages as soon as possible, bid in the property for somewhere near its present value, and take judgment against the makers of the notes for any deficiency there might be." This certainly could not be construed into an authority to bid in the property for the full amount of the notes and thereby discharge the maker and the person who had assumed the payment of the notes as a consideration for his deed.

While there can be no adverse criticism upon the plaintiff's action in bidding off the property, for it had the right to make itself the purchaser and to bid such sum as it saw fit upon such purchase, yet, if it did elect so to do, it must stand upon its rights as a purchaser;

and having exercised its election to become a purchaser, or neglected to follow the instructions of or agreement with the defendant, it cannot, after the consummation of the sale and the receipt of the benefits, repudiate that position and revert to the one of agent of the defendant. It is not upon the plaintiff to make the election after the deed as to its position, but having departed from instructions, and apparently to the detriment of the defendant, the election is in the defendant, and it is the defendant who has the right to say whether the agent who has departed from her instructions, or the trustee who has gone beyond its duty, shall occupy the position of purchaser or not.

It will make but little difference how the transaction may be characterized, whether it be called a conversion or a departure from authority, under a mistaken idea of the rights of the parties. In either event, the injury to the defendant is the same, and the rule of responsibility is to be applied rather to the act itself than to the name which may be given to it.

We conclude that the plaintiff, having the right either to follow the plan suggested at the conference with Atwater, or to act independently and purchase the property itself and account to the defendant for the proceeds, having elected to purchase the property and having bid a price in excess of the one suggested or agreed upon, became liable as a purchaser for its own benefit, and is subject to account to the defendant to the extent of the purchase price.

Plaintiff should be adjudged a purchaser for the amount bid, and should account for that purchase price, as though the property had actually been sold for that amount to a third party.

The judgment should be affirmed, with costs.

McLENNAN, P. J., and WILLIAMS, J., concurred; HISCOCK, J., dissented in an opinion in which SPRING, J., concurred.

HISCOCK, J. (dissenting):

I am unable to concur in the conclusion reached by the majority of my associates, that the judgment appealed from should be affirmed.

The action was brought by plaintiff to recover against defendant upon a note for $5,000 and interest, and also the sum of $2,298.60 for moneys loaned and advanced.

Defendant, not disputing much of her indebtedness upon said claims, sought to hold plaintiff liable for the sum of about $24,000 and interest, being the amount at which, upon the foreclosure of certain mortgages, it had bid in certain real property, and to recover judgment for the balance of said sum over and above her indebtedness.

The referee before whom the case was tried found in favor of her demand, and hence the judgment appealed from, which includes a large amount of interest upon the principal sum found due to defendant.

I think such judgment was not authorized either by the pleadings or by the proofs upon the trial, and should be reversed.

Defendant is a resident of this State. Plaintiff, as its name implies, is a corporation organized and doing business in the State of Minnesota.

In December, 1886, one Whitney, at St. Paul in said State, executed and gave to defendant ten several notes, aggregating $20,100, and executed upon lands situated in said State five several mortgages securing said notes. These securities have become the source of the trouble and present litigation between the parties hereto.

Several years before this action was commenced, defendant deposited the same with plaintiff for collection and care. Subsequently she assigned them to it as security for moneys borrowed and already referred to. The lands covered by the mortgages were transferred by Whitney to other parties who failed to make proper payments upon the notes and to pay taxes. These defaults occasioned much correspondence between defendant and plaintiff and one Atwater, who, as attorney and friend, represented her in Minneapolis. Finally it was decided by defendant that it was necessary to have plaintiff foreclose the mortgages. It is claimed in her behalf that the final instructions by her upon this subject were embodied in directions given by Atwater to the plaintiff on or about July 5, 1894. As the exact nature and tenor of these instructions has been made a matter of importance under the defendant's claim, we shall quote them as repeated in a letter by Atwater to defendant. The former says: "I have talked over your matters with Mr. Lindley (one of plaintiff's officers) and told him there was no

other course except to proceed to foreclose the Sumbardo (Whitney) mortgages as soon as possible, bid in the property for somewhere near its present value and take a judgment against the makers of the note for any deficiency there might be."

It is disputed by plaintiff that these were the final or controlling directions, but we shall assume for the purposes of this appeal that they were.

After receiving them, plaintiff, in whose name the mortgages stood, proceeded to foreclose the same by advertisement, and upon the sale, claiming to have acted as defendant's representative, bid in the lands for the full amount due upon the notes and mortgages which was in the neighborhood of $23,000 or $24,000.

It was upon this sale that plaintiff did the things upon which has been built up its liability in this case. Defendant's complaint against it rests solely upon the grounds, *first*, that it bid in the property in its own name, and, *second*, that it bid the same in at the full amount of indebtedness due rather than at the actual value of the lands, which is found to have been about $20,000, thereby canceling any claim against those personally responsible upon the notes for the difference between the amount of the indebtedness and the actual value of the property. Of course the criticism that no proceedings have been taken to secure any personal judgment against the makers of the notes is comprised within the last ground of complaint. There being no deficiency there was no opportunity for a personal judgment.

Having before our mind these simple and practically undisputed facts it may be remarked at the outset that it is interesting, if not a trifle perplexing, to note the various theories upon which those stand who have advocated or approved defendant's right to the judgment which she recovered.

Her attorney in her answer as his theory alleges: "That the plaintiff at its own option and volition without any request or direction of defendant * * * by its own attorney * * * caused proceedings for foreclosure * * * and on such sale (of the premises) said plaintiff bid off and purchased and obtained title to each and all the parcels of land covered by said five mortgages for its own use and benefit and * * * has ever since held and now holds title to all said lands in its own right absolutely free and clear

from any claim of this defendant therein or thereto, * * * and by said foreclosure, sale and purchase * * * all other claims, sums and demands alleged to have been then owing to plaintiff by defendant became and were thereby paid and satisfied."

The learned referee in his report, especially in findings of fact numbered 31, 32, 35 and 49, disavows this theory, and by controlling inference at least finds that plaintiff in instituting said foreclosure acted at the request and in the interest of the defendant and that it "was negligent in the collection of the said collateral notes and mortgages in causing the mortgaged premises to be sold at the full amount due on the respective securities and thus releasing, from all liability on the same, the said Whitney, the maker of the said notes, and the said Van Dyke, the grantee of said premises, who had assumed the payment of the same," and then holds as a matter of law that "plaintiff having obtained title to the mortgaged premises and released the parties who were personally liable to pay the debts secured thereby, has converted the pledged securities," and must account to defendant for the full value thereof.

I have no doubt whatever that the referee was correct in refusing to adopt the theory set forth in the defendant's answer, that plaintiff had proceeded of its own volition and upon its own account in foreclosing the mortgages. The correspondence between the parties establishes beyond any reasonable question whatever, that the plaintiff was trying to compel defendant to pay her indebtedness and that it was the defendant who desired that foreclosure should be instituted for her benefit as the best method of obtaining something upon her notes and mortgages.

The learned counsel for the respondent upon this appeal in his elaborate and able brief has, as it seems to me, thought best not to adopt the views either of the attorney or of the referee.

As I study his argument he does not anywhere seem to seriously claim that plaintiff, as an actual fact, so acted in its own interests and in intentional hostility to the rights and equities of defendant in these securities as to have been guilty of a conversion of the same to its own use. Neither does he appear to much urge that this judgment can be sustained upon the finding of negligence made by the referee, but in the complete analysis of all of his argument he seems to urge upon our consideration that this judgment for conver-

sion by plaintiff of defendant's securities may be affirmed because the former acted in disregard of its instructions to bid in said lands at their actual value; that having disregarded these instructions and caused loss to defendant in the cancellation of the personal liability of certain parties it cannot claim any authorization for anything which it has done in the foreclosure of the mortgages and, therefore, its acts being without authority gave to defendant the right to treat it as a wrongdoer and the election to charge it as a purchaser for itself with the full amount at which it has bid off the property.

By the findings of fact this court is limited to an affirmance of the judgment upon the ground that plaintiff, acting in behalf of defendant and being authorized to foreclose these mortgages for her, was negligent in that it bid in the property for about $24,000 instead of $20,000. That is the interpretation of the facts by which the trial court has arrived at the judgment before us, and this court must be guided and controlled thereby unless upon this appeal it shall not only disregard the facts found, but also find others in their place.

The first, and to my mind apparently insuperable obstacle to affirming the judgment, is the impossibility of bringing the findings of the referee within the limits of any issue presented by the pleadings.

The defendant's answer setting forth her cause of action against plaintiff, not only in its affirmative allegations already quoted, but by its denials of authority and agency alleged in the complaint, is framed broadly and unequivocally upon the lines that plaintiff, acting as pledgee of the securities, upon its own responsibility and of its own motion foreclosed the same and bid in the property at a certain price at and for which it is to be held accountable. This was a perfectly proper and logical attitude to assume towards a pledgee which had foreclosed its securities and become chargeable with the amount realized on their sale.

There is no suggestion of any obligation to defendant in the course of those proceedings by virtue of any relationship of agent or representative with any resulting liability by reason of negligence or defiance of authority.

The action was tried upon those pleadings without amendment. Nothing occurred in the course of the trial which could fairly apprise the plaintiff of a change of complaint. The evidence of witnesses

was all taken upon commission and was properly addressed to the issues framed by the pleadings as they stood. It was entirely pertinent for plaintiff to meet the allegation that it had been acting solely upon its own volition and for its own benefit, by giving evidence that it had been acting under and in accordance with defendant's instructions.

It was the referee's report, so far as the record discloses, which gave plaintiff its first notice of a liability predicated, not upon the claim pleaded that it had been acting of itself and for itself, but upon the exactly opposite one that it had been acting for defendant and that in the discharge of its duties to her as such, it had conducted itself so negligently that, as matter of law, it had become guilty of conversion.

It seems to me that no further statement of the facts in this respect, or argument thereon, is necessary to demonstrate that the court is confronted with the question whether it will sustain a judgment rendered upon findings and a theory radically at variance with the pleadings.

Of course, unless the error committed by plaintiff in bidding in the property at the full amount of about $24,000 due upon the securities rather than at its actual value of $20,000, and which error was due to negligence, did make the plaintiff a trespasser *ab initio* and so guilty of conversion, it is impossible to see how the judgment can be sustained at its present amount in any event. The only damages suffered by defendant as the result of plaintiff's negligent conduct was the loss of personal liability of the makers of the notes for the difference between the actual value of the property and the amount bid and being about $4,000.

It may be urged that this court has power upon this appeal to so amend the pleadings as to conform to the findings and sustain the judgment. Both the authorities and the rules of fairness to litigants forbid that such an amendment should be made upholding a judgment upon charges substantially different from those alleged in the pleadings, and which the parties have never had a chance intelligently to contest. The appellant in this case did not have an opportunity upon the trial to object to such an amendment because there was nothing to indicate that it was contemplated. (*Southwick* v. *First Nat. Bank of Memphis*, 84 N. Y. 420.)

Passing from this discussion of the pleadings I come to the consideration upon the merits of the question whether the proofs and findings of fact by the referee, which I must assume to be binding upon the defendant and this court, authorized any such conclusions of law and judgment as was reached.

As was stated at the beginning, defendant's judgment ultimately rests upon two acts performed by plaintiff in the foreclosure as essential elements of its alleged liability to her. These are the bidding in of the property in its own name, and the disregard of instructions in bidding the full amount due upon the securities rather than the actual value of the lands. It is to one of these things that the argument for defendant's claim always reverts. In considering them we must not fail to remember that the referee has by necessary implication found that although plaintiff bid in the property in its own name it was acting for defendant, and that its overbid was due to negligence and not to any intentional, willful misconduct.

I am unable to appreciate the significance which would be attached to plaintiff's bidding in the real estate in its own name. I am unable to see just what else it could have done. It concededly held the mortgages upon a perfectly valid and honest assignment as security for certain indebtedness. It was seeking from defendant payment of that indebtedness. As the evidence and findings abundantly show, she desired and requested the foreclosure. In complying with her wishes, and although acting as her agent and for her benefit, it was not incumbent upon it to disregard or throw away its own interest in the securities. It was necessary to bid in the property in somebody's name. Defendant was a non-resident of the State, and I cannot conceive of any principle which required, or in the exercise of good management permitted, the plaintiff to purchase the property in her name and thus lose its claim in and upon the real estate which thenceforth stood in the place of its mortgages. It is suggested in the prevailing opinion that it elected to become the purchaser of the property, and must stand upon its rights as such. There is nothing in the evidence that indicates that plaintiff ever contemplated anything else than foreclosing the mortgages and bidding in the property for defendant, subject, of course, to its own claims thereon. Under the findings of the referee there cannot be

the slightest doubt as a question of fact that plaintiff now holds the title for the defendant.

While the exigencies of sustaining defendant's judgment apparently are deemed to require utilization of the fact of plaintiff's bidding off the premises in its own name, it perhaps is to be stated that not so much importance seems to be attached to that as to the other one, that plaintiff bid a higher price than it was authorized to.

The learned counsel for the respondent argues, and the prevailing opinion seems to hold, that that amounted to a conversion which destroyed plaintiff's agency and made it liable for the full amount of its bid as having acted for its own interest. This view suggests the general inquiry whether a person acting for another who discharges his engagement with perfect fidelity down to the final act and then negligently, but without intentional misconduct, departs from his instructions, not in the general nature and character of the act performed, but only in some detail of its execution, thereby destroys and loses all protection of his original authority and becomes in effect a wrongdoer acting upon his own responsibility and constructively for his own benefit. Applied to the facts of this particular case the view so urged and adopted suggests the query whether plaintiff, because in discharging the contemplated duty of selling and bidding off the property negligently bid $4,000 too much, has thereby become deprived of all authority from defendant to act in her behalf and may be treated as a purchaser in its own right and charged with the entire purchase price of the premises. If this is the rule, that an agent who adheres with fidelity to his instructions as regards the substantial character of the acts which he performs and the general manner of performance thereof, is to lose the authority and indemnity of his principal and become personally responsible for all engagements because through mere negligence he has erred in some detail, it needs no argument to demonstrate that it will be rigorous and far reaching.

Of course it is elementary that an agent may so depart from his instructions in respect to the substantial character of the acts performed that he will lose the benefit and authority of his original agency and in a proper case become guilty of conversion.

But that does not seem to me to be this case. It seems to me that in such a case as this, where the agent has dealt with property

in a manner and for a purpose authorized, it would be a harsh and forced doctrine to hold that he has been guilty of unauthorized conduct in respect to his entire act, and of consequent conversion because the amount merely of the bid, which he was empowered to make, was too large. It seems to me that it will be more sensible and equitable to regard the agency and authority as continuing and protecting him from the charge of conversion, leaving to the principal the right of appropriate remedy by which to recover such damages as have resulted from the violation of instructions.

The principles embodied in this view seem to be fully sustained in *Laverty* v. *Snethen* (68 N. Y. 522).

In that case an agent intrusted with property of his principal parted with it in a way and for a purpose not authorized and he was held liable for conversion. In the course of its opinion, however, the court says, as pertinent to the present discussion: "The cases most strongly relied upon by the learned counsel for the appellant are *Dufresne* v. *Hutchinson* (3 Taunt. 117) and *Sarjeant* v. *Blunt* (16 J. R. 74), holding that a broker or agent is not liable in trover for selling property at a price below instructions. The distinction in the two classes of cases, I apprehend, is that in the latter the broker or agent did nothing with the property but what he was authorized to do. He had a right to sell and deliver the property. He disobeyed instructions as to price only, and was liable for misconduct, but not for conversion of the property, a distinction which, in a practical sense, may seem technical, but it is founded probably upon the distinction between an unauthorized interference with the property itself and the avails or terms of sale. At all events the distinction is fully recognized and settled by authority. * * * The result of the authorities is that if the agent parts with the property, in a way or for a purpose not authorized, he is liable for a conversion but if he parts with it in accordance with his authority, although at less price, or if he misapplies the avails, or takes inadequate for sufficient security, he is not liable for a conversion of the property, but only in an action on the case for misconduct."

There would seem to be no difference in principle between the case where an agent authorized to sell has sold for too little, and the case where an agent authorized to buy has bid too much.

In *Sarjeant* v. *Blunt* (16 Johns. 74, 75), Judge SPENCER, writing

in behalf of the court, says: "If every departure from instructions is to expose a party to an action of trover, I should consider it as introducing a new rule which might operate injuriously; there is no need of this refinement. An action on the case is well calculated to redress any injury arising from a breach of instructions. In this case the defendant was authorized to sell the chronometer for a particular price. The complaint is not that he sold, but that he sold it for a less sum, and thus violated his orders. The selling was not a conversion; but selling for a less price was a breach of duty."

While the referee has based his report definitely and solely upon the proposition that plaintiff was guilty of conversion, there seems to be some disposition, if necessary, to abandon this ground and to seek to uphold defendant's judgment upon the apparently broader and more general one that plaintiff cannot claim any authority from defendant for bidding in the property because it disobeyed her instructions as to the amount to be bid. This amounts to the assertion of the principle that an agent cannot claim authority and indemnity from his principal for what he has done if he has in any detail failed or neglected to follow his instructions.

It is difficult to see how the assertion of defendant's right to recover in this form differs materially from a statement of her right based upon an alleged conversion, or how it avoids the principles enunciated in the cases referred to. If plaintiff, being authorized to sell, would not have been guilty of a conversion because parting with the property intrusted to it for a less sum than was authorized, I fail to see how the agency of plaintiff authorized to bid in property can be repudiated because it has erroneously bid more than it was instructed to. If it would not have been guilty of a conversion in the former case, then in the latter I do not see how defendant can refuse to acknowledge its agency and accept the property which it has bid in for her, whether she bases her right to refuse upon an alleged conversion or upon a claim more general in form, that she is not bound to recognize an agent which in any respect has departed from its instructions. The mistake which plaintiff made in its bid for the property has not in any respect altered or affected the results of the substantial act which it was authorized to perform in bidding the property in for the defendant. As her agent it bid in the property for her just as it was authorized

to do. The only result of its overbid has been to destroy a possible incidental and collateral right to pursue the makers of the note to a deficiency judgment. Her loss, if any, in this regard can be easily and adequately compensated for as suggested in the cases already cited by an action or counterclaim against her agent for a breach of duty.

Something is said in behalf of defendant that there is in this case an element of conversion, in that the property has been placed where it cannot be restored to defendant, and that plaintiff's action in bidding in the property deprived her of all right in the mortgaged property and of all remedies against the makers of the notes and that she cannot be restored to her former position. Of course, if this means that defendant could not have her mortgages foreclosed and at the same retain them, the proposition must be conceded. Otherwise, and outside of a loss of the right to recover a judgment for deficiency for $4,000 which has been fully discussed, I fail to see how the defendant has lost any rights in her property or has been placed in any different position than was to be anticipated. Her mortgages by the process of foreclosure have necessarily been exchanged into real estate to which, under the findings of the referee in this case, the plaintiff now holds title as her agent.

In addition to the main questions involved upon this appeal, various exceptions to rulings made by the referee upon the trial are urged upon our attention, and there is at least one which seems to deserve attention.

Upon the examination of one Lindley, who was one of plaintiff's witnesses and also one of its officials having charge of defendant's matters, an effort was made by plaintiff to show that before the foreclosure, through commercial agencies and otherwise, he made an investigation as to the financial responsibility of one Whitney who was the maker of the notes secured by the mortgages and learned that he had none. This evidence was apparently offered for the purpose of explaining and excusing plaintiff's conduct in bidding the property in at the full amount of the securities and thus releasing Whitney. It was ruled out by the referee as irresponsive, incompetent and hearsay. So far as the first ground is concerned, it is to be borne in mind that this evidence was sought upon interrogatories where less strict rules prevail as to the technical

forms of questions and answers than upon the oral examination of a witness present in court. So far as the other grounds are concerned, they were probably tenable upon the issues presented by the pleadings, but if it is to be held that it was proper, irrespective of the pleadings, to incorporate into this case negligence as a ground of plaintiff's liability, then certainly this evidence was competent. It then became proper for plaintiff to introduce evidence, not only that Whitney was financially irresponsible, but also evidence which, though falling short of establishing this as a matter of fact, did go to the extent of showing that it had investigated his responsibility, and had been informed that he was irresponsible, as an excuse for not procuring a personal judgment against him and as bearing upon the question whether it was negligent or not.

For the various reasons discussed, I think that the judgment should be reversed and a new trial granted.

SPRING, J., concurred.

Judgment and order affirmed, with costs.

GEORGE W. CEIGLER, Respondent, v. HOPPER-MORGAN COMPANY. Appellant.

Negligence — basis of recovery by a father for injury to his infant son — it does not cover the son's support after arriving at age, or the father's loss of time or his services in his son's care, or his loss of business.

In an action brought by a father, whose infant son had been injured by the alleged negligence of the defendant, to recover damages for the loss of the infant's services, the court charged, "you can allow to the father, the plaintiff in this case, all the actual loss sustained by reason of this injury to the child, and illness, including his own services in taking care of him, his neglect of business in consequence of the child's illness, and the necessary charges for medical services, medicine, nursing, and all the necessary expenses and loss incurred, as the natural and approximate result of the injury. And also his prospective loss by being deprived of the child's services during the remainder of his minority, *as well as the probable prospective loss from being compelled to support the child in consequence of the injury.*"

Held, that the charge was erroneous in that it improperly instructed the jury that the plaintiff was entitled to recover for the maintenance of the child after

it became twenty-one years of age, and that the plaintiff could recover for his own loss of time, for his services in taking care of the child, and also for the neglect of business in consequence of the child's illness.

APPEAL by the defendant, the Hopper-Morgan Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Jefferson on the 17th day of January, 1903, upon the verdict of a jury for $1,068, and also from an order entered in said clerk's office on the 19th day of January, 1903, denying the defendant's motion for a new trial made upon the minutes.

Joseph Atwell, for the appellant.

N. F. Breen, for the respondent.

STOVER, J.:

The action is one of negligence, and is brought by the father to recover for the loss of services of an infant son.

The son was, at the time of the accident, fifteen and one-half years old, and was engaged in operating a machine which was used for cutting pads. A knife was put in motion by throwing the machinery in gear, and, when once in motion, would descend and do its work. The claim is that the machine was out of repair; that the knife was not stopped when it had performed its work, but was operated the second time, and came in contact with the hand of the boy so as to cut off his hand at the wrist.

The judgment must be reversed for errors committed at the trial. The trial judge, after discussing the right of the plaintiff to recover at all in the action, charged the jury upon the question of damages as follows:

"If you reach the question of damages, the question of the amount that the father can recover for the loss of the services of the son, you can allow to the father, the plaintiff in this case, all the actual loss sustained by reason of this injury to the child, and illness, including his own services in taking care of him, his neglect of business in consequence of the child's illness, and the necessary charges for medical services, medicine, nursing, and all the necessary expenses and loss incurred, as the natural and approximate result of the injury. And also his prospective loss by being deprived of the

child's services during the remainder of his minority, *as well as the probable prospective loss from being compelled to support the child in consequence of the injury.*"

The defendant's counsel excepted to this portion of the charge, and the court remarked, "That is broad enough to cover my charge. I charged what I understood to be the general rule." So the court distinctly charged that the plaintiff was entitled to recover for the maintenance of the child after he became twenty-one years of age.

The court may have been led into this error by assuming that the obligation was upon the parent to support the child who was unable to support himself. But if the plaintiff's son has been injured, the son would have a right of action against the defendant, and be entitled to recover in his action for the injury he has sustained; and in that recovery would be included the damages by reason of the loss of the arm. One of the circumstances which would tend to increase the damages would be that he would be unable to work and support himself, and a money judgment would be awarded for that element of it.

The father would not ordinarily be bound to support the young man after his arrival at twenty-one years of age, and it might be that the young man would be self-supporting, notwithstanding the loss of his arm, and, without proof of his financial condition in this action, it could not be assumed that the father would have to maintain him.

It was also error, we think, to charge that the father could recover for his loss of time, for his own services in taking care of the child, and also for neglect of business in consequence of the child's illness. (*Barnes* v. *Keene*, 132 N. Y. 13.)

There was no proof as to the amount of loss to his business, and such proof would have been inadmissible in any event.

As the case must be reversed for these errors, we do not discuss the other questions raised upon the appeal.

All concurred; HISCOCK, J., in result only.

Judgment and order reversed and new trial ordered, with costs to the appellant to abide event, upon questions of law only, the facts having been examined and no error found therein.

In the Matter of the Estate of JOSHUA MATHER, Deceased.

NATHAN L. MILLER, as Comptroller of the State of New York, Appellant, Respondent; IDA F. LOVELACE and NICHOLAS PENDERGAST, as Administrators, etc., of CHARLES W. MATHER, Deceased, Respondents, Appellants.

MAUD MATHER MCCHESNEY and Others, Respondents.

Transfer tax — imposed on a life tenant of real property, where (although holding a deed thereof from the testator) he elects to treat it as part of the testator's estate — the life tenant's heirs acquiring the estate in remainder are not bound by his election.

Joshua Mather, who died in August, 1893, by his will, gave his nephew, Charles W. Mather, a life estate in his residuary estate, and empowered the said Charles W. Mather to dispose of the remainder of the residuary estate by will among his descendants, and provided that, in default of a will, the remainder of the estate should pass to the heirs at law and next of kin of the said Charles W. Mather.

Upon the appraisal of the estate of Joshua Mather, for the purposes of the transfer tax, Charles W. Mather testified that Joshua Mather was, at the time of his death, the owner of a certain piece of real property. A transfer tax was thereupon assessed upon the life interest of Charles W. Mather in the real property in question, and the tax upon the remainder of the residuary estate was suspended until his death.

Charles W. Mather died intestate, and among his papers was found an unrecorded deed executed to him by Joshua Mather, conveying the property in question. This deed was made and delivered during the lifetime of Joshua Mather, and there was nothing to impeach its validity excepting the statement made by Charles W. Mather upon the assessment proceedings.

Held, that Charles W. Mather, having, for some undisclosed reason, voluntarily determined to ignore his absolute title to the property and to submit to the imposition of the transfer tax upon his life interest, such transfer tax should not be vacated;

That the statement of Charles W. Mather that Joshua Mather owned the property in question at the time of his death was not binding upon his heirs;

That they were entitled to stand upon their title derived under the will of Joshua Mather, or upon their title derived under the deed from Joshua Mather;

That having elected, at the first opportunity afforded them, to stand upon their title under the deed, they were not liable for a transfer tax.

HISCOCK, J., dissented.

CROSS-APPEALS by Nathan L. Miller as Comptroller of the State of New York, and by Ida F. Lovelace and another, as adminis-

trators, etc., of Charles W. Mather, deceased, from an order of the Surrogate's Court of the county of Oneida, entered in said Surrogate's Court on the 28th day of September, 1903, modifying in some respects and refusing to modify in other respects an order theretofore entered in said court adjusting the transfer tax upon the estate of Joshua Mather, deceased.

Charles R. Coville and *Russel S. Johnson*, for the State Comptroller.

Smith M. Lindsley and *William S. Mackie*, for the administrators.

Josiah Perry, for the respondents.

STOVER, J.:

Two appeals herein, from an order of the Oneida county surrogate, are presented. The administrators of Charles W. Mather appeal from that part of the order which modifies the original taxing order. The State Comptroller appeals from that part of the order which granted the application of Mrs. McChesney, a daughter of Charles W. Mather.

Joshua Mather died in August, 1893, leaving a will, which was admitted to probate September 11, 1893.

The will of Joshua Mather, after certain other provisions, by the 23d clause thereof, gave to Charles W. Mather, a nephew of the testator, the possession, use, income, profits and rents of the residuary estate during his lifetime, and the entire control and management of the estate, personal and real, as he might deem for his best interests and that of the persons who, under the will, would be ultimately interested in the estate, of which he was to have the income during his lifetime, authorizing him to conduct the business in the name of the testator or otherwise, and empowering the said Charles W. Mather to make such disposition of the estate as he might deem wise among his descendants whom he might leave, and in such proportions and amounts as he might desire. He further provided that if, for any reason, the said Charles W. Mather failed to make such will, or if such will was not admitted to probate, the property enjoyed by said Charles W. Mather during his lifetime should go to the persons whom the said Charles W. Mather

might leave as his next of kin and heirs at law at the time of his death in the same manner and proportions as if the said Charles W. Mather had been the absolute owner thereof at the date of his death and had died intestate and unmarried.

Charles W. Mather was also constituted sole executor of the will, the 24th clause of said will providing as follows: "And he," referring to said executor, "shall in no event be required to furnish any bond or security as such executor, and no person or court shall compel him to account for how he manages my estate, or how he invests the same as executor and legatee and devisee under this my last will and testament."

Upon the completion of the probate of the will of Joshua Mather the estate was appraised, and Charles W. Mather assumed the duties of executor and continued such during his lifetime.

Upon the appraisal of the estate, Charles W. Mather was examined and testified that Joshua Mather, at the time of his death, was the owner of certain real estate in the city of Utica, and known as the Arcade property, being generally described as about 120 feet on Genesee street and 150 feet deep.

This Arcade property was appraised at $175,000, and the tax upon the life interest of Charles W. Mather was fixed at $4,852. The tax upon the residuary interest was suspended until the death of Charles W. Mather, as it was uncertain to whom the property would descend; if it was disposed of by the will of Charles W. Mather, his estate would be liable for the tax, and if not, then the persons to whom it descended would be chargeable therewith.

Charles W. Mather died in November, 1899, intestate, not having exercised the power of disposition given by the will. The petitioners are the heirs of Charles W. Mather.

After the death of Charles W. Mather, a deed, executed by Joshua Mather to Charles W. Mather, conveying the Arcade property above mentioned was found among the papers of Charles W. Mather. The petitioners thereafter, upon investigation, made an application to the Surrogate's Court to have the assessment set aside, the Arcade property stricken from the proceedings had upon the assessment, to correct the report and order by striking therefrom the amount included therein as a tax upon the Arcade property, and for other relief. The surrogate, upon such application, after taking evidence,

modified the order, in so far as it assumed to assess a tax against the heirs of Charles W. Mather, but refused to set aside or modify the assessment as against Charles W. Mather. This appeal was thereupon brought.

We think the order of the surrogate was right. The evidence clearly showed that the deed from Joshua Mather to Charles W. Mather was made and delivered during the lifetime of Joshua Mather, and, although it was not recorded until after the death of Charles W. Mather, there was nothing to impeach its validity, except the statement made by Charles W. Mather upon the assessment proceedings.

It is true that the evidence that he made a statement is not contradicted, nor is it explained, and it may be quite possible that if the original parties were able to speak, some explanation could be given of that statement; but whatever force it might have against Charles W. Mather, his heirs, the petitioners herein, would not be bound by such statement.

Charles W. Mather, for some undisclosed reason, determined to ignore the absolute title for the time being, and submit to the imposition of the tax. He was under no restraint or duress; whatever he did was voluntary, and, presumably, for what he deemed to be his best interests. His heirs, however, have the same right that he had, namely, to rely upon their title under the will of Joshua Mather, or upon the deed from Joshua Mather. Unlike their ancestor, they prefer to rely upon the deed, and they are not foreclosed from doing this by any act of Charles W. Mather. It is true that, as to the property, they acquire no better title than Charles W. Mather had, but as to the method of the enjoyment of their estate, they are quite independent of and not bound by any acts of Charles W. Mather. The statement and act of Charles could only affect his estate and his enjoyment of the property, and therefore, the tax was properly levied against him, as, upon his own statement, he claimed under the will; but he did not assume to bind his heirs, nor would they be estopped by his statement, had he so assumed. No tax has ever been assessed against them, they have promptly asserted their rights, and, upon the first opportunity to be heard, have elected to stand upon their title under the deed.

They have been guilty of no *laches*, and no valid reason has been presented for estopping them from so doing.

The order of the surrogate must be affirmed, with ten dollars costs and disbursements.

All concurred, except HISCOCK, J., who dissented from the affirmance of that portion of the order which relieves the heirs from taxation upon the Arcade property.

Order affirmed, with ten dollars costs and disbursements.

THOMAS DONAHUE, Respondent, *v.* KEYSTONE GAS COMPANY, Appellant.

Negligence — destruction of shade trees in a street by gas — liability of the gas company to an abutting owner who does not own the fee of the street — a reference in a deed to a map whose lines do not conform to street lines as actually laid out — the title passes to the street line as actually laid out and used.

An owner of premises abutting upon a street, who does not own the fee of the street, is entitled to recover damages for the destruction of ornamental shade trees standing in the street in front of his premises caused by gas leaking from mains laid by a gas company in the street.

It is not material who planted the shade trees, provided they have been sanctioned by the authorities.

The measure of the abutting owner's damages is the difference between the value of the property with the growing trees and its value with the trees removed.

In an action in which the plaintiff's right to recover depended upon whether he was an owner of property abutting upon Union street in the former village of Olean, it appeared that the plaintiff's conveyance described the premises as bounded by the westerly line of the street and as being in block 125, according to a map of the village made by one Gosseline. Union street, as laid out upon the Gosseline map, was one hundred and sixteen feet wide, while, as actually laid out and as used for more than fifty years, it was about ninety feet wide, thirteen feet apparently having been taken from each side and included in the abutting lot.

The Gosseline map appeared to be a theoretical map and streets afterwards laid out did not conform to the theoretical lines delineated on the map.

Held, that the plaintiff was an abutting owner;

That the description used in the conveyances made since the street was actually located referred to the visible and actual located line of the street and not to the theoretical line shown upon the Gosseline map;

That it could not be contended, because the plaintiff's grantor had received a conveyance of the disputed thirteen-foot strip bounded by the street, that the title to such strip was still in the plaintiff's grantor;

That such grant was evidently intended to operate as a release to the plaintiff's grantor of whatever interest his grantor had in the disputed strip, and that, as the plaintiff's conveyance bounded the premises by the westerly line of the street, his grantor would be estopped from denying that the land contiguous to the front of the plaintiff's premises was a street.

APPEAL by the defendant, the Keystone Gas Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Cattaraugus on the 21st day of May, 1903, upon the verdict of a jury for $150, and also from an order bearing date the 18th day of February, 1903, and entered in said clerk's office, denying the defendant's motion for a new trial made upon the minutes.

J. H. Waring, for the appellant.

Parker & Cobb, for the respondent.

STOVER, J.:

This is an action brought to recover damages for injury to premises of plaintiff through the destruction of ornamental shade trees in front of his premises on the west side of Union street in the city of Olean, by reason of leakage of gas from the mains of defendant, which were laid in the street in front of plaintiff's premises, and near the trees which were destroyed.

The facts upon which the rights of the plaintiff in the street depended, and the negligence of the defendant, were litgated upon the trial, and as the questions of fact were settled by the verdict, we see no reason for interference with them.

The questions of law, however, are contested. The plaintiff takes his title by a description which bounds him by the westerly line of the street, and the premises are described as being in block 125, according to a map of the village made by one Gosseline.

From some of the exhibits used upon the trial, it would appear that Union street, as laid out by the Gosseline map, was one hundred and sixteen feet wide. The Gosseline map does not appear among the exhibits, but it does sufficiently appear that the map was made a great many, and more than fifty, years ago. This map seems to have been a theoretical one, and streets, when after-

wards laid out, did not conform to the theoretical lines in the map, as it appears that Union street, as actually laid out, and used for more than fifty years, was about ninety feet wide, making a difference of twenty-six feet; and it would appear that this space had been equally divided, thirteen feet taken from the westerly side of the street, and thirteen feet from the easterly side, or, at least, that the thirteen feet from the westerly side had been included in the adjacent lots.

The deeds locate a starting point at the corner of block 134, but the actual location would show that line at present to be in or upon a street laid out since the Gosseline map was prepared.

It is quite evident that whatever confusion has arisen from the location of the easterly line of plaintiff's premises grows out of the narrowing of the street: but whatever there may be of the defendant's contention with reference to this, we think it must be held that the description used in the conveyances of the premises since the street was actually located and used refers to the boundary line as located; that the plaintiff obtained title to the visible and actually located line of the street, and is not bound by the theoretical line upon the Gosseline map.

It will be observed that the reference to the Gosseline map is not for the purpose of locating the boundary lines, but is a general description, showing that the property is in a certain block, and the references to the conveyances to the street line must, in view of the fact of user and location, as proven in this case, be construed to refer to the line as actually located.

The contention that the plaintiff's grantor, Higgins, is still the owner of the thirteen feet, is also, we think, not well founded, as the deed to Higgins, conveying the thirteen feet bounded by the street, was evidently intended to operate as a release of whatever interest Higgins' grantor had in the disputed strip. As Higgins by his deed bounded the plaintiff by the westerly line of the street, he conveyed the strip in question. It is not to be presumed that he intended to reserve rights in a strip in the street so as to prevent access to the premises. He would be bound by his own deed, and having conveyed to the street, could not be heard to dispute the right of the plaintiff to treat the premises contiguous to his in front as a street, and subject to his rights and that of the public in and to

the street. So it may be assumed that plaintiff was an abutting owner upon Union street in question.

The trial judge charged the jury as matter of law: "That the plaintiff had a property right in those trees (although they were not planted upon lands that he had the title to) sufficient to permit him as a matter of law to maintain an action against any person who might wrongfully injure or destroy the same."

This brings up the proposition that the plaintiff could recover for injury to his premises by reason of the destruction of the trees, although he was not the owner in fee of the land in the street. This is the main legal proposition litigated upon the trial.

The contention of the defendant is that the plaintiff, having no title to the street, but only such general rights as the public and an abutting owner would have in the street, cannot complain of injury of the character which he alleges he has sustained in this action.

We do not think this contention sound. Assuming the facts to be as the jury have found, that by reason of the destruction of the trees the value of plaintiff's premises has been lessened, it would be, we think, not in line with modern jurisprudence to say that, although his property has been injured in this way, and although the interference was an illegal one by a wrongdoer, and through an act amounting to a public nuisance, he is without remedy and must submit to the loss.

We think it more consistent with the trend of recent adjudications to hold that an abutting owner whose property is injured by a wrongdoer, and, as in this case, by negligence and carelessness resulting in a nuisance, is entitled to recover the damages sustained.

The general rule of law governing nuisances might be applied in this case, namely, that anything which is calculated to interfere with the comfortable enjoyment of a man's house or premises, any wrongful act which destroys or deteriorates his property, or interferes with the lawful use or enjoyment thereof, or hinders him in the enjoyment of a common or public right, and thereby causes him special injury, is a nuisance. In the case under discussion the jury have found, under a fair instruction in that particular, that the plaintiff's premises were injured and his enjoyment thereof injured by the unlawful act of the defendant.

The defendant's right to the street was limited to a proper use,

and the escaping of gas so as to destroy vegetation in the ground above was not an incident to such use or a result ordinarily to be expected from the enjoyment of the defendant's rights, but it would be clearly wrong, and we do not understand that any claim of justification to the extent of permitting gas to escape is insisted on.

The general rule of law has been applied in the elevated railroad cases, and in those cases it has been stated that the injury arose by interference with light, air and access; but the cases nowhere place these as the only particulars in which enjoyment of premises may be interfered with.

In cities where shade trees may be obstructions to the streets a different rule might apply and the authorities might lawfully remove them, perhaps, as obstructions, but this question does not arise in this case. There is no attempt on the part of the authorities to remove, nor any claim on the part of any one of a right to interfere with the trees.

We think the principle discussed in *Lane* v. *Lamke* (53 App. Div. 395) applicable to this case, namely, "The abutter who sets out ornamental shade trees in the street opposite his premises, at his own expense and with the sanction of the municipal authorities, is entitled to have such trees protected against negligent or willful destruction at the hands of third parties."

The fact that the trees were planted by the abutter is immaterial; for, by whomever planted, the abutter has the right to the enjoyment thereof so long as they are there with the sanction of the authorities.

Some question has been made as to the rule of damages which was adopted in this case, but we think the correct rule was stated by the trial judge, viz., the difference between the value of the property with the growing trees and its value with the trees removed. It is the value of the right of which the plaintiff has been deprived, namely, the enjoyment of the premises with the trees, and to the extent that he has been deprived he is entitled to recover. If the value of his property has been depreciated by the wrongful act of the defendant he is entitled to recover to the extent that it has been depreciated.

The rule of damages has been laid down in many adjudicated cases that where property has been interfered with and has depre-

ciated in value and without the destruction of the fee, the owner is entitled to recover the difference in the value of the premises before and after the interference.

Reference has been made to the case of *Halleran* v. *Bell Telephone Co.* (64 App. Div. 41), but we do not deem the doctrine of that case inconsistent with the views above expressed. The basis of that decision was the failure of evidence showing any interference with the enjoyment of the abutter's premises, and the opinion being based upon the fact that his right was not, to any extent, interfered with, the finding of fact there being "That the telephone poles do not interfere in any degree with any right which the plaintiff has as an abutting owner."

We find no error and the judgment and order should be affirmed.

All concurred; HISCOCK, J., in result only.

Judgment and order affirmed, with costs.

EDWARD L. RIKER and Others, Plaintiffs, v. THE PRESIDENT AND DIRECTORS OF THE FIRE INSURANCE COMPANY OF NORTH AMERICA, OF PHILADELPHIA, PENNSYLVANIA, Defendants.

Fire insurance policy — what is not a waiver, on the part of the insurance company, of its right to insist on proofs of loss.

In an action brought to recover upon a standard policy of fire insurance, it appeared that the property, which was covered by several policies of fire insurance, was destroyed in an incendiary fire, that a few days after the fire the defendant's adjuster called upon one of the plaintiffs and requested information as to the fire, stating that the other owners that he had met could not give the adjusters the desired information. He also stated that the adjusters wanted an itemized statement of each article and the cost sent to them. Upon being told that it would be impossible to comply with this request, because the burned property had been purchased as a whole, he stated, according to the plaintiffs' version, that they could get along by taking a catalogue and getting it as near as they could. "He said we could make it out and send it to Knapp, and he would send it to the other adjusters," and he said, "we will get together and see if we cannot fix you fellows out."

The next morning the defendant's adjuster called upon one of the plaintiffs and said substantially that if anything more than the list spoken of was needed, he would write him. Sometime after this interview the plaintiffs made out a list headed "List of Machinery and Outfit of Ontario Canning Factory. Burned

Sept. 19, 1902." The list did not purport to give the estimated loss, but the various items had extensions of figures. It did not appear whether such figures represented the original cost or present value, or what relation they bore to the articles.

Subsequently the defendant's adjuster, with an adjuster of another company, called upon one of the plaintiffs and told him, among other things, that there were things in the list which they did not understand and asked for some explanation. The plaintiffs took no steps to ascertain in what respect the list furnished was unsatisfactory or not understood, and furnished no other statement or proof except the list above mentioned.

This interview occurred on October 17, 1902. The fire occurred on September 19, 1902, and the sixty days within which the policy required the insured to serve proofs of loss expired December 18, 1902. An action to recover upon the policy was brought on the 17th day of February, 1903.

Held, that the plaintiffs were properly nonsuited;

That the evidence was not sufficient to warrant the jury in finding that the defendant had waived the furnishing of the proofs of loss required by the policy;

That the plaintiffs had ample opportunity, after notice that the defendant required further information than that contained in the list furnished, to protect themselves either by furnishing additional information or by complying with the condition of the policy respecting the furnishing of proofs of loss.

McLENNAN, P. J. and SPRING, J., dissented.

MOTION by the plaintiffs, Edward L. Riker and others, for a new trial upon a case containing exceptions ordered to be heard at the Appellate Division in the first instance upon the dismissal of the complaint by direction of the court after a trial at the Wayne Trial Term.

Frederick W. Smith and *E. W. Hamn*, for the plaintiffs.

Horace McGuire, for the defendants.

STOVER, J.:

This is a motion for a new trial, made by the plaintiffs, upon exceptions ordered to be heard in the first instance by the Appellate Division.

Plaintiffs obtained from defendants a standard policy of insurance, and some time thereafter the property insured, or a portion thereof, was burned.

A few days after the fire, an adjuster of the defendants called upon one of the plaintiffs and requested information as to the fire, stating that he had been looking over the ruins; that the other owners he had met could not give the adjusters all the information they desired, and they had waited for that plaintiff. He also stated

that they wanted an itemized statement of each article, and its cost, sent to them, and upon being told that that would be impossible, because the outfit was purchased as a whole, he then stated, according to plaintiffs' version, that they could get along by taking a catalogue and getting it as near as they could. "He said we could make it out and send it to Knapp, and he would send it to the other adjusters," and he said, "we will get together and see if we cannot fix you fellows out." The next morning, according to plaintiffs' version, this same adjuster called upon one of the plaintiffs and said, substantially, that if anything more than the list spoken of was needed he would write him, and he was then told to write to Mr. Riker, another of the plaintiffs, as the one he was then talking with would be in Canada. The list had not then been furnished.

It would appear from the record that the object of the adjusters, upon their first visit to the premises, was to obtain information with respect to the fire; that the plaintiffs who had, and could give, the information, did not appear until near the close of the day, and after some of the adjusters had left the premises. Plaintiffs, some time after this interview, made out a list which was headed: "List of Machinery and Outfit of Ontario Canning Factory. Burned Sept. 19, 1902." The list does not purport to give the estimated loss, but the various items have extensions of figures; whether the original cost or present value, or what relation they bear to the articles, is not stated.

Subsequent to the sending of the list, the defendant's adjuster, together with an adjuster of another company, called upon the plaintiff Sanders, and told him that there were things in the list they did not understand, and asked for some explanation. According to plaintiffs' testimony, they said they were looking for the man who made out the list; that there were some things about it they did not understand; and then said they would appoint a day to meet plaintiffs Pintler and Riker, as Sanders had told them they were the persons who made out the list.

This testimony of plaintiffs is contradicted by the adjuster, who says he told Sanders the list was unsatisfactory and incomplete, and could not be used, and Sanders said he did not know anything about it; that he did not make it, and that Pintler and Riker were the men to see. Sanders denies that he was told the list was useless.

The plaintiffs took no steps to ascertain in what respect the list furnished was unsatisfactory or not understood, and furnished no other statement or proof, except the list above mentioned.

At the close of the evidence the plaintiffs' complaint was dismissed, apparently upon the ground that plaintiffs had failed to establish a cause of action against the defendant.

The claim of the plaintiffs is, that giving the list to the defendant's adjuster, under the circumstances, amounted to a waiver of proofs of loss.

It appears that Pintler, after the interview with the adjusters, in which it was stated there was something about the list they did not understand, received a letter from his son, in which, according to his own statement, his son notified him that Sanders had had an interview with the adjusters, and the adjusters wanted to see him. It will be seen, taking the testimony of the plaintiffs Sanders and Pintler, that they knew the list furnished needed some explanation, and the adjusters wished to see them about it.

The standard policy contains the following clause: "If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article, and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company signed and sworn to by said insured, stating the knowledge and belief of said insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of the fire."

The interview between plaintiff Sanders and the adjuster, in which it was stated that there were things in the list they did not

understand, occurred on October seventeenth. The fire occurred on September nineteenth, and the sixty days within which proofs of loss should have been furnished expired December 18, 1902.

We think the nonsuit was properly granted. The evidence was not sufficient to warrant the jury in finding that there was a waiver on the part of the defendant of the duty of the plaintiffs to furnish the proofs of loss described in the policy.

Waivers of conditions in policies have received liberal constructions, and, in order to avoid forfeitures, rigid rules of interpretation have not been favored; and yet, with this in view, we should not lose sight of the fundamental rule that the intention or understanding of the parties is to control. In cases of disagreement as to the actual conclusion of the parties, if one to whom a duty is owing has, by his acts, led the other to believe that he would not require the performance of the duty, and the one relying upon such belief has neglected to perform the duty, a waiver would be implied and the party in default relieved.

We must presume that parties doing business of this character enter upon the transactions with some knowledge of their rights and obligations, and the duty to act fairly is reciprocal. The agents of the defendant, visiting the fire for the purpose of obtaining information in regard to it, requested the list to be furnished; but this was nothing more than the policy itself required. At the time the agents left the premises upon the first visit they had not seen the list and did not know what form the plaintiffs would put it in. They had a right to assume that as to the information asked for the list or inventory would be in substantially the form which the policy indicated. The statement that "We will get together and see if we cannot fix you fellows out" could not be interpreted to mean, "If you furnish us with any sort of a list we will pay the amount of the policy," which is substantially the interpretation now put upon it by the plaintiffs.

When, subsequently, the plaintiffs were informed, and it clearly appears that they were informed, that there was something in the list which was not understood, it was their plain duty to take steps to protect their interests and to explain the lists. They then had more than thirty days within which to make a list under the policy, and certainly the notice that there were some things in the list that

were not understood was as clear an indication that the list was not received as a compliance with the policy as the statement of the insurers that they would try and "fix" them out, if the list was furnished, was an indication of intent to waive.

It would seem that the better interpretation of the transaction is that the insurers were endeavoring to obtain satisfactory information, and, if it should be obtained, probably an adjustment would be had without resort to proofs, and the conversations and transactions between the parties indicate that it was simply an attempt to obtain information which might lead to a possible adjustment, rather than an intention to waive the conditions of the policy. No argument is needed to show that the list furnished was in nowise an attempt to comply with the conditions of the policy, nor is it claimed to be such; but the plaintiffs' whole case rests upon the deduction of a waiver from the acts of the insurer.

This was concededly an incendiary fire. The insurer was endeavoring to get such information as it could; the plaintiffs furnished no satisfactory information, and, in fact, seem to have neglected all measures calculated to aid, not only in a determination of the origin or cause of the fire, but as to the condition of, and loss upon, the property insured. A total loss is claimed.

The plaintiffs had ample opportunity, after notice that further information was required, to protect themselves, either by furnishing the information or by complying with the plain condition of the policy, and furnishing the inventory and statements there required. They neglected to do either.

We think that the transactions between the adjusters and the plaintiffs were not sufficient to warrant a finding of a waiver on the part of the insurer, and that the plaintiffs' failure to furnish the information required under the conditions of the policy was a complete defense to the action.

The complaint was properly dismissed, and the plaintiffs' exceptions must be overruled.

WILLIAMS and HISCOCK, JJ., concurred; McLENNAN, P. J., and SPRING, J., dissented.

Plaintiffs' exceptions overruled, motion for new trial denied, and judgment ordered for the defendant, with costs.

DENNIS DONOVAN, Respondent, *v.* THE CITY OF OSWEGO and Others, Appellants.

Assessment for a local improvement in the city of Oswego — unequal assessments reviewed by certiorari — where the entire assessment is illegal the review may be by suit in equity — the assessors in determining the principle of assessment act judicially — adoption of a uniform rate per foot of frontage allowable — inclusion therein of a sum for incidental expenses — consent of property owners where part is to be paid out of the highway fund — inclusion of the cost of gas and water connections — public notice thereof — consent of owners thereto.

If a person assessed for a local improvement claims that his property has been unequally assessed in comparison with that of other property in the assessment area, his remedy is by a writ of certiorari to review the assessors' action. In such a case the vice does not pervade the entire assessment, but a reassessment may be ordered by the court.

If the local improvement was made without authority or if the assessors did not have jurisdiction to levy the assessment or levied it upon an entirely wrong principle, the vice extends to the entire assessment and the property owners may attack the assessment by an action in equity.

In determining the principle upon which an assessment for a local improvement shall be based the assessors act judicially, and their determination will not be disturbed unless it is apparent that the principle adopted was incorrect and unfair to the property owners.

The adoption by the assessors charged with the duty of apportioning the expense of paving a city street nearly half a mile in length, of a uniform rate per foot of frontage is not improper, even though the buildings upon one of the blocks of the street in question are worth twenty times as much as the buildings on another block of such street.

The inclusion in the estimated cost of a local improvement in the city of Oswego of a five per cent contingent fund, intended to meet reasonable and incidental expenses which would inevitably arise in the construction of the improvement and which it was difficult to itemize, does not render the assessment for the local improvement invalid, especially in view of the provision of section 256 of the charter (Laws of 1895, chap. 394, as amd. by Laws of 1897, chap. 263) which requires the excess of the assessment to be returned ratably to those from whom it was collected.

Under section 258 of the charter, which prohibits the common council from ordering a local improvement, the cost of which shall exceed $10,000, except upon the consent of a majority of the property owners liable to assessment therefor, and that such section shall not be applicable to a local improvement, the cost of which is "to be defrayed from moneys raised or to be raised by virtue of a special election," the consent of a majority of the property owners is not necessary where a portion of the cost of a local improvement is to be paid out of the highway fund raised by virtue of a special election.

The power given to the common council to include in a local assessment for paving a street "all curbing or other structures incident to such pavement and laid at the same time therewith" extends to water and gas connections with mains existing in the street at the time the pavement is being laid.

The public notice of the intention to order the public improvement required by section 141 of the charter need not mention the making of the gas and water connections, as they are subsidiary to the laying of the pavement.

Section 44 of the charter, which provides, "The common council shall not have power, and is hereby forbidden to grant permission to any person, company or corporation to lay or place in, upon or under, or encumber in any manner, any of the streets * * * with * * * gas or water mains or pipes * * * without and until the legal consent in writing, duly acknowledged, of at least one-half of the owners of abutting property shall first have been obtained and filed with the city clerk," does not apply to the making of the gas and water connections in such a case.

APPEAL by the defendants, The City of Oswego and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Oswego on the 2d day of January, 1903, upon the decision of the court, rendered after a trial at the Oswego Special Term, vacating and setting aside certain assessments.

Elisha B. Powell, for the appellants.

Spencer Brownell, for the respondent.

SPRING, J.:

This is an action in equity to vacate an assessment levied upon property of the plaintiff located on the south side of East Bridge street in the city of Oswego. One entire assessment is for $18,482.91 for the construction of an asphalt pavement on that street, and the other of $2,310.97 for putting in water and gas connections and lateral sewers. The assessment levied against the property of the plaintiff was $1,700, and the pavement taxes thereon $589.91. Plaintiff's lot has one hundred feet frontage. The westerly twenty-five feet has upon it a cheap building, but the remaining seventy-five feet is a vacant lot used as a woodyard.

It is unnecessary to enter into a minute analysis of the various sections of the city charter (Laws of 1895, chap. 394, as amd. by Laws of 1897, chap. 263) which are applicable. It is sufficient to note that the initial steps for the paving of a street or the making of any local improvement thereon are lodged with the department of works (Charter, § 140, as amd., *supra*). The plan requires public notice of

the improvement contemplated and the hearing of any objections which may be presented (§ 141, as amd., *supra*). In its determination the department determines what proportion of the cost of the improvement is to be raised by local assessment and what part, not exceeding one-half, is to be paid from the highway fund (§ 140, as amd., *supra*). The common council upon this determination orders the improvement to be made by the department of works and the assessment to be made by the local assessors (§§ 142, 312, subd. 4). Section 320 (as amd., *supra*) in further defining the powers of the department of works provides in subdivision 2: "To determine, by a resolution to be entered in the minutes of the proceedings of said department, what portion, if any, of the expenses of making any sewer or sewers, pavement or curbing, shall be paid by the city at large, and what part or portion thereof shall be defrayed by local assessment upon such portions of the real estate in said city as the board of local assessors shall deem more immediately benefited thereby." The assessment is to be "apportioned as equitably as may be" (§ 250), which general direction seems to be the only requirement in that regard. Ample provision is also made for the hearing of objections by the assessors upon the review of their assessment and appeal may be taken from their decision to the common council (§§ 250, 251).

On the 23d day of February, 1898, the department of works gave notice of an intention to construct a pavement on East Bridge street from First to Ninth streets, a distance of about 2,500 feet. The estimated cost of the improvement was apportioned as follows: $18,482.91 to be assessed upon the property benefited, $9,807.60 from the highway fund, $5,241.99 to be paid by the street railway company and there was a $15 charge for the cost of advertising. The proceedings culminated in a resolution of the common council, April 25, 1898, directing the department of works to make the improvements, and ordered the necessary assessment to be laid. Upon the review day the plaintiff appeared and objected to his assessment and his objections and those made by others interested were heard and considered by the board of assessors. The assessment was laid and the improvements made and the property of the plaintiff subsequently sold to pay the taxes levied against it, upon the failure of the plaintiff to pay the same.

The mode of assessment adopted was by the front foot, each bordering lot being subjected to the same front foot assessment.

At the outset it is contended that the action to remove the cloud on the plaintiff's title is a collateral attack upon the assessment and is not permissible. The rule is a salutary one that where assessors are charged with making an unequal assessment the review of their action should be by certiorari. The determination of the question does not then in any event utterly invalidate the entire assessment but a reassessment may be ordered by the court and no substantial injury may result to the municipality. If, however, the board of assessors did not possess the jurisdiction to make the assessment, or if the improvements resulting in the tax levy is without authority of law or upon an entirely wrong principle the remedy may be by action if extrinsic evidence is essential to establish its legality. (*Alvord* v. *City of Syracuse*, 163 N. Y. 158; *County of Monroe* v. *City of Rochester*, 154 id. 570, 579.) In the present case it appears, as already noted, that the method of assessment resorted to by the board of assessors was a uniform rate per front foot of the abutting premises. If the plan was erroneous in principle the vice extended to the whole assessment rendering it invalid, and the plaintiff or any taxpayer charged with the payment of a tax could attack it as has been done in the present case by an action in equity. If a taxpayer claims that his property is unequally assessed compared with those of his neighbors or of other owners of property within the taxing district the remedy to relieve him from the disproportionate assessment is by certiorari. (*Matter of Adler Bros. & Co.*, 76 App. Div. 571, 576 *et seq.;* affd., 174 N. Y. 287.) The whole assessment is not vitiated by the unequal assessment in that case. Here the vice, if any there be, pervades the whole assessment for if the position taken is tenable the mode chosen was erroneous.

But was the rule adopted erroneous? It was not wholly by an arbitrary criterion, for the assessors examined the situation, taking into consideration the buildings and existing conditions and determined that the assesssment by uniform foot frontage was the most equitable of any which could be chosen. They acted judicially in this determination (*O'Reilley* v. *City of Kingston*, 114 N. Y. 439, 448), and their decision will not be disturbed unless it is apparent that the principle adopted was incorrect and unfair to the property

owners. The bare fact that the assessment was apportioned among the abutting owners according to the lineal foot frontage of their several lots does not by any means establish that the method chosen was erroneous. (Case last cited.) In *People ex rel. Scott* v. *Pitt* (169 N. Y. 521) the Legislature fixed the assessment for the construction of sewers in the city of New Rochelle at a definite sum per front foot. The court in passing upon the validity of this requirement uses this language (at p. 528): "Hence the principle adopted in this case of distributing the burden according to frontage at a fixed sum for each linear foot of sewer constructed, was a valid exercise of power, not prohibited by any constitutional provision or any legal principle applicable to taxation for local improvements. Some other principle might, indeed, operate more fairly upon some particular individual, but upon the whole the rule adopted by the Legislature in the charter was, perhaps, as fair as any other that could be devised. It has one decided merit that, perhaps, any other rule would not have, and that is that every property owner is required to pay only according to the extent of his possessions, and all are on a basis of equality. It may be that the sewer was a greater benefit to one than to another, but objections of this character could be made whatever principle was adopted. The principle of distributing the cost of a local improvement, or some part of it, upon property located upon the street where the improvement is made according to the frontage of lots, or upon the basis of a specified sum per linear foot, is within the power and discretion of the Legislature, and so long as the burden is less than the actual cost of the improvement in front of the lot the property owner has no just ground to complain." The keynote of every such assessment is that it must be made according to the benefits conferred. The assessment upon any hypothesis can never be computed with exact equality and fairness. The discretion and good judgment of the assessors who view the property must ordinarily be controlling as to the justice of the assessment made.

The pavement in question extended along East Bridge street from the heart of the city to East Ninth street, nearly half a mile. The property at First street was more valuable than that at the other end of the pavement. For instance, the block on the south side of said street between First and East Second streets with a frontage of

200 feet was assessed upon the general assessment roll at $68,000. The block on the same side of East Bridge street between East Eighth and East Ninth streets with a like frontage and which included the land of the plaintiff was assessed upon the same roll at $3,000. Each of these blocks was chargeable with about the same sum for the cost of the improvement on East Bridge street. It does not follow, however, there was any injustice in this apportionment. The assessors concluded that each square would derive an equal benefit from the construction of the pavement. The vacant lot might be rendered the more accessible with a greater probability of being brought into the market as salable property by reason of the improvement. We cannot say that because one block is worth by reason of the buildings upon it twenty times more than another block that it will receive the same proportionate enhancement in value from the construction of the pavement as the less valuable tract. This pavement was all on one street and the assessors could readily take into cognizance the comparative effect its construction would have upon each bordering lot. The plaintiff gave proof tending to show that the value of the lot had not increased by the laying of the pavement. That is no satisfactory standard to aid us in determining whether the assessors adopted an erroneous principle or not. Their judgment may not be sustained by subsequent events. Other circumstances and conditions may enter into the question affecting the value of plaintiff's premises. We are inclined, therefore, to think the court below erred in determining that this assessment was invalid by reason of the plan adopted by the assessors in making the assessment.

Some of the other objections urged to the validity of the assessment we will briefly advert to. In the estimated cost of the improvement was included a five per cent contingent fund of $1,596.98, and it is contended that this addition was unwarranted. This item was intended to meet reasonable and incidental expenses which would inevitably arise in the construction of the improvement and which it was difficult to itemize. Had the officers made an estimate of these various items which in their judgment composed this gross sum, if fairly made, it could not be claimed that the assessment was vitiated thereby. Nor do we think that is the effect now, especially in view of the provision of section 256 of the charter which requires

that "the excess shall be refunded ratably to those from whom it was collected."

In 1896, in accordance with section 125 of the charter, the taxpayers at a special election voted that $10,000 be raised each year for three successive years and added to the highway fund to be exclusively used in making local improvements of a permanent nature. The resolutions voted upon further provided that any "unexpended balance of said ten thousand ($10,000) dollars remaining in either of said three years may be expended in any following year for the same purpose and subject to the same conditions and limitations as if expended in the fiscal year in which the same was raised." The city's contribution of $9,807.60 was ordered paid from this fund, and, as already noted, such payment must come from the highway fund. At the time the resolution was adopted the charter (§ 258) prohibited the common council from ordering a local improvement the cost of which should exceed $10,000 except upon the consent of a majority of the property owners liable to assessment therefor or of the owners of one-half in value of the property affected thereby. It is claimed the present assessment is violative of that provision. Before any preliminary steps had been taken looking towards the paving of East Bridge street this section had been amended by chapter 263 of the Laws of 1897 so that it was not applicable to a local improvement the cost whereof is "to be defrayed from moneys raised or to be raised by virtue of a special election." Under this act the consents were unnecessary.

There is no question over the amount of the money which was chargeable to the city for its proportion of the cost of this pavement. It is of little concern to the plaintiff from what fund the money was paid. The other objections urged by the respondent to the validity of the assessment we do not deem necessary to discuss separately. Suffice it to say we think the charter provisions were fairly complied with.

The plaintiff was assessed upon local assessment roll No. 77 for water and gas connections and lateral sewers seventy-five dollars and fifty cents, and it is claimed this assessment is illegal. A water company owned a plant in said city whose line extended along under the surface of East Bridge street at the time said pavement was put in and that is equally true of a gas line. In order to make the con-

nections with these lines before the pavement was laid the municipal authorities notified the owners to make them, and advised such owners that the same would be made by the city and the expense thereof charged to each owner benefited unless done by him within the time specified in the notice. The plaintiff did not comply with the notice, and the connections were thereafter made under the direction of the city by the company which constructed the pavement, and a local assessment roll was prepared conforming to the requirements of section 250 of the charter and the plaintiff's tax thereon was seventy-five dollars and fifty cents.

It is contended that there is no specific warrant in the charter for making these gas and water connections. The control of the streets and of their improvement and of the ordering of public improvements and of the apportionment of the expenses thereof are vested in the department of works. (§§ 130, 140, 320, subd. 2, as amd., *supra.*) The common council, in levying a local assessment for paving a street, may include therein "all curbing or other structures incident to such paving and laid at the same time therewith." (§ 322, as amd., *supra.*) Connections of this kind are evidently incidental to the construction of the pavement, and the necessity or wisdom for making them before the pavement is laid is obvious. Otherwise the pavement must be torn up and its usefulness seriously impaired every time an abutting owner desires to connect his premises with the water or gas line in the street.

Section 141 of the charter (as amd., *supra*), as already noted, requires the department of works to give public notice of its intention to order any local improvement. This notice is not to be accompanied with any statement of expense, nor are the details of the proposed improvement up for consideration, but the propriety of making it at all and the hearing of the abutting owners preliminarily, are the reasons for this requirement. The notice was published and the plaintiff appeared and objected to the improvement intended. The notice said nothing as to making gas and water connections, nor do we deem it necessary, for they were subsidiary to the laying of the pavement, and unless that was ordered, the necessity for the incidental expenditures would not arise.

On March seventh following the department of works in due form ordered the pavement made, including "all necessary connec-

tions with sewer, gas and water mains in any of said streets. All in accordance with specifications on file in the office of the City Engineer."

The required advertisement of this determination was published and the date of the hearing fixed for March fourteenth, at which time several parties appeared and were heard. In all the proceedings subsequent these connections were included as part of the improvement to be made. In the resolution accepting the bid for the construction of the pavement, in accordance with the specifications adopted by the defendant, the city engineer and superintendent of works were "directed to prepare estimates of the cost of the said local improvements * * * according to the terms of said specifications for pavements proposed to be laid, * * * all necessary curbing, catch-basins, connections, headers and all necessary connections with sewers, gas and water mains at any of said streets, showing separately the estimated cost of that part of said pavements lying within the lines of street intersections."

This excerpt is a type of those appearing in each of the resolutions and notices pertaining to this improvement. The plaintiff had full knowledge that these connections were to be made and objected thereto. The fifth finding of fact on the second cause of action by the court in its decision contains the following: "That all of said connections were placed in front of plaintiff's property against his objection, with the exception of one water connection."

The certificate of the cost of these improvements was presented to the common council with the request of the department of works that the common council authorize the making of the local assessments therefor upon the property benefited, which was done. The plaintiff appeared before the assessors and objected to the assessment against him and appealed to the common council from the adverse decision, and that decision was affirmed. The proceedings from the outset seem to have been carried on pursuant to the charter and the plaintiff had all the notice to which he was entitled, and apparently availed himself of it to oppose the putting in of the improvements.

The court below held, and it is now strenuously urged, that section 44 of the charter applies to these gas and water connections. That section, so far as material, reads: "The common council shall not have power, and is hereby forbidden to grant permission to any

person, company or corporation to lay or place in, upon or under, or encumber in any manner, any of the streets * * * with * * * gas or water mains or pipes * * * without and until the legal consent in writing, duly acknowledged, of at least one-half of the owners of abutting property shall first have been obtained and filed with the city clerk."

The consents of the abutting owners to the making of these connections were not obtained. No permission was granted in this case to any corporation to lay mains in the streets. The mains were already laid, and the department of works, and then the common council, ordered the company putting in the pavement to make these connections upon the refusal of the owners to do so. They were already provided for in the estimates and specifications, and the municipal authorities, in their discretion, deemed it feasible that they should be made before the completion of the pavement. As a practical measure the authorities knew the connections would ultimately be made with the abutting premises, and they determined, as they might, where each connection should be placed, and directed it to be made. It was never intended that the common council must defer the ordering of these connections with a line already laid until the abutting owners consented thereto. Again, the legal consent of "at least one-half of the owners" is made a prerequisite by section 44 referred to. It was of no importance to the plaintiff whether his neighbor had these connections or was without them. The value or usefulness of his premises was not affected thereby. The section implies that there is a common interest among the abutting owners where the improvement is to be made which must be preceded by the consent of a certain number of the owners. It does not apply where the effect of the improvement is distinct and separate in its bearing upon each owner's premises.

The judgment should be reversed and a new trial granted, with costs to the appellant to abide the event.

All concurred.

Judgment and order* reversed and new trial ordered, with costs to the appellant to abide event, upon questions of law only, the facts having been examined and no error found therein.

* *Sic.*

FRANCIS X. ZAPF, Appellant, v. LULU N. CARTER, Respondent.

Form of order entered upon a remittitur from the Court of Appeals — remedy if the remittitur be erroneous — an order at Special Term concludes a party until it is reversed on appeal.

An order of the Supreme Court, entered upon a remittitur transmitted to it by the Court of Appeals, must conform strictly to the remittitur. If the remittitur is erroneous in any respect the remedy is by an application to the Court of Appeals to amend it.

An order of the Special Term, denying an application properly made to that court, is valid until reversed; and if no appeal is taken from the Special Term order, the Appellate Division will not entertain a similar application.

MOTION by the respondent, Lulu N. Carter, for an order granting judgment absolute after the coming down of the remittitur from the Court of Appeals, which did not direct judgment absolute for the respondent.

George C. Carter, for the motion.

John Conboy, opposed.

SPRING, J.:

The respondent presents a copy of the remittitur of the Court of Appeals and asks that an order be granted for judgment absolute. The appeal in this case was dismissed by the Court of Appeals, and upon the coming down of the remittitur the respondent applied to the Special Term for an order making the judgment of the Court of Appeals the judgment of the Supreme Court. The Special Term granted the motion. The order was entered, but did not provide for judgment absolute in favor of the respondent. The order is not appealed from, and we might well rest our denial of the motion upon the ground that the order granted is binding upon this court, as it was proper to make the application to the Special Term, and its order is valid until reversed. Waiving that question, however, there is an insurmountable barrier to the motion. The appeal was dismissed by the Court of Appeals and its entry does not authorize the entry of judgment absolute. The remittitur contains the judgment of the Court of Appeals and is sent down to the court below

as the authority for the order of the lower court. The Court of Appeals determines by its remittitur when judgment absolute may be entered. (Code Civ. Proc. § 194.) If there is any error in its remittitur in failing to order judgment absolute when the respondent is entitled to that relief, or if erroneous in any respect, the court issuing it may amend it. The order of the Supreme Court must conform strictly to the remittitur. That court has no power to vary the terms of this judgment of the Court of Appeals. (*Matter of Protestant E. Public School*, 86 N. Y. 396; *Wilkins* v. *Earle*, 46 id. 358; *Parish* v. *Parish*, 87 App. Div. 430; 2 Rumsey's Pr. [2d ed.] 875.)

The motion is denied, with ten dollars costs.

All concurred.

Motion for judgment absolute denied, with ten dollars costs.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, *v.* HENRY J. HEINZ COMPANY and C. A. HALDT, Respondents.

Vinegar — when the addition of water in its manufacture is not an adulteration — the word "pure" defined.

Where it appears that, in the initial stages of the manufacture of cider vinegar, the product contains so high a percentage of acetic acid as to render it unmarketable, unpalatable and not properly a vinegar but an acid, and wholly unfit for the purposes to which merchantable vinegar is usually put, the fact that, for the purpose of reducing the percentage of acetic acid and of rendering the product palatable, marketable and suitable for use as vinegar, the manufacturer adds to the product a quantity of water, which, although not distilled, is pure as that term is commonly accepted, does not establish an adulteration of the vinegar within the meaning of sections 50, 51 and 52 of the Agricultural Law (Laws of 1893, chap. 338, as amd. by Laws of 1901, chap. 308).

The word "pure," as used in these provisions of the Agricultural Law, does not mean "chemically pure," but means "free from mixture or contact with that which is deleterious, impairs, vitiates or pollutes."

APPEAL by the plaintiff, The People of the State of New York, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Erie on the 16th day of December, 1902, upon the decision of the court, rendered

after a trial at the Erie Special Term, dismissing the complaint upon the merits.

John Cunneen, Attorney-General, and *William F. Mackey*, for the appellant.

John G. Milburn, for the respondents.

STOVER, J.:

This action is brought to recover penalties for violations of sections 50, 51 and 52 of the Agricultural Law (Laws of 1893, chap. 338, as amd. by Laws of 1901, chap. 308), which are as follows:

"§ 50. Definition of adulterated vinegar.— All vinegar which contains any proportion of lead, copper, sulphuric acid, or other ingredients injurious to health, or any artificial coloring matter, or which has not an acidity equivalent to the presence of at least four and one-half per centum, by weight, of absolute acetic acid, or cider vinegar which has less than such an amount of acidity, or less than two per centum of cider vinegar solids on full evaporation over boiling water, shall be deemed adulterated. The term cider vinegar, when used in this article, means vinegar made exclusively from pure apple juice. Provided, however, that cider vinegar made by a farmer in this State exclusively from apples grown on his land, or their equivalent in cider taken in exchange therefor, shall not be deemed adulterated, if it contain two per centum solids and sufficient alcohol to develop the required amount of acetic acid.

"§ 51. Manufacture and sale of adulterated or imitation vinegar prohibited.— No person shall manufacture for sale, keep for sale or offer for sale:

"1. Any adulterated vinegar.

"2. Any vinegar or product in imitation or semblance of cider vinegar, which is not cider vinegar.

"3. As or for cider vinegar, any vinegar or product which is not cider vinegar.

"§ 52. Packages containing cider vinegar to be branded.— Every manufacturer or producer of cider vinegar shall plainly brand on the head of each cask, barrel, keg or other package containing such vinegar, his name and place of business and the words 'cider vinegar.' And no person shall mark or brand as or for cider vinegar any package containing that which is not cider vinegar."

The complaint, by several allegations, charges that the defendants engaged in selling, keeping for sale and offering for sale "a substance made in imitation and semblance of cider vinegar manufactured exclusively from pure apple juice, and which was not and is not pure cider vinegar, but a compound manufactured in imitation and semblance thereof," falsely branding it as cider vinegar, and that it is not pure cider vinegar, and with having falsely printed upon or affixed labels to the barrels and casks containing said adulterated compound, calculated to deceive the purchasers of the spurious vinegar.

Plaintiff also alleged the manufacture by defendants of an adulterated compound, made in imitation or semblance of cider vinegar, but which was not cider vinegar made exclusively from pure apple juice.

Samples were taken from barrels by inspectors from the agricultural department, and no question is made as to the fairness of the samples. Analyses of the samples were made, both by chemists for the State and chemists for the defendants, and it is conceded that the samples were identical. According to the analysis of the defendants the samples contained the requisite per centum of cider vinegar solids, and the evidence shows that the acetic acid may vary in cider vinegar from three to six or seven per cent, and that the solids remaining in the vinegar have no special virtue or value, but are there simply because they have not been eliminated in the process of extracting the juice or in the process of manufacture.

The testimony of the defendants' manager as to the making of the vinegar showed that the apples were squeezed, the juice put in tanks, where it was allowed to remain for some time; then put in clearing tanks or vats, and from there into generators. In those generators alcohol, as the result of the fermentation, was turned into acetic acid. The acetic acid was then put in tanks and allowed to remain for a long time, and then reduced to the acidity which the law permits, and barreled for use. This reduction of the acidity is accomplished by the use of pure water, no other ingredient being added.

It also appears that when taken from the tanks for the purpose of reducing to vinegar the amount of acetic acid that is developed

is very high; that it is neither palatable nor marketable vinegar, but is still acid, as distinguished from vinegar, and is not desirable or marketable for general use and such uses as vinegar is generally put to.

We may, perhaps, dispose of the contention as to the defendants' adulteration of the vinegar as shown by analyses, by confirming the holding of the trial judge that the product of the defendants was unadulterated and contained no proportion of lead, copper, sulphuric acid or other ingredients injurious to health, or any artificial coloring matter, and had an acidity equivalent to at least four and one-half per centum by weight of absolute acetic acid, or not less than two per centum of cider vinegar solids on full evaporation over boiling water, and that it complied in every particular with the standards and requirements of the statute in that case made and provided.

So far as conforming to the standard required by section 50 of the statute, the evidence fully justified the finding of the trial judge, and no reason is shown for interfering with the conclusion reached. But the further claim is made by the plaintiff that, inasmuch as water was used in the treatment of the acetic acid, a violation of section 51 of the statute prohibiting the sale as or for cider vinegar of any product or vinegar which is not cider vinegar has been shown, and the allegations of the complaint are established thereby.

We do not think this a sound conclusion. Having in view the evident intention of the statute to prevent adulteration and the introduction of deleterious matter into vinegar products, such construction should be given to the statute as would accomplish this purpose, while not trenching upon the rights of the manufacturer or dealer in vinegar products. We think the construction attempted to be given to the word "pure," as used in section 50 of the statute, is not the construction intended by the legislators. The word "pure" means not only free from all foreign substance but in its original sense "pure" means "free from any defiling or objectionable mixture." We have in chemistry pure products, but in the various uses the chemical standard is modified to a great extent. For instance, we speak of pure water, meaning by that water that is not contaminated, not defiled, not vitiated, although it may have mineral salts in solution. It may have in solution any product not deleterious;

yet, strictly speaking, the only water that can be said to be chemically pure is distilled water. Still, in the various legislative acts providing for pure water for municipalities and communities, it has never been contemplated that absolutely chemically pure, distilled water was to be procured.

Under the evidence in this case, and it is undisputed, the presence of water is necessary in order to make a vinegar. In the process of manufacture the high percentage of acetic acid renders the product unmarketable, unpalatable, and not properly a vinegar, but an acid, and wholly unfit for the purposes to which merchantable vinegar is usually put.

There is no denial that the water was pure water in the common acceptation of these words, not distilled water, and there is no claim made nor evidence to show that its addition was deleterious or in any way impaired the quality or deteriorated the product, but, upon the contrary, it rendered the product a palatable and marketable article.

The object of the statute, namely, to prevent adulteration and injury to health, is not defeated, or in any way hindered, by the treatment of the apple juice in the course of manufacture by the introduction of pure water, for the purpose of reducing the acid to vinegar. And so long as the product complied with the standard of unadulterated products, all its ingredients being pure, and in no way deleterious, it ought not to be declared impure or adulterated.

The construction to be given to the word "pure," as used in section 50 of this statute, should be "free from mixture or contact with that which is deleterious, impairs, vitiates or pollutes." Within this definition no violation of the statute has been shown, and the findings of the trial judge were justified by the evidence.

No error appears, and the judgment should be affirmed, with costs.

All concurred.

Judgment affirmed, with costs.

JOHN R. WILLIAMS, as Temporary Receiver of THE HOLBROOK INSOLE COMPANY, Respondent, *v.* THE GERMAN INSURANCE COMPANY, Appellant.

Fire insurance policy — the limitation therein requiring suit to be "commenced within twelve months next after the fire," construed — the time runs until sixty days after an appraisal where an appraisal takes place — estoppel of the company — abandonment of an appraisal and proceeding to sue, not authorized.

In an action upon a policy of fire insurance it appeared that the policy provided that in the event of a disagreement as to the amount of the loss, it should be ascertained by two appraisers, one appointed by the insurer and one by the insured, and that the two appraisers should have power to select an umpire; that the policy also provided that if an appraisal was had, the loss should not become payable until sixty days after the appraisers had made their award. Another clause in the policy provided as follows: "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

The fire occurred on October 9, 1900. August 8, 1901, an agreement was made appointing appraisers to determine the amount of the loss. Without any fault on the part of either party the appraisers did not meet until October 7, 1901. They met at this time and looked over the property, but did not choose an umpire. Upon separating, however, they agreed to make inquiries as to several names submitted for the position of umpire.

October 8, 1901, before the appraisers had again met, the insured brought an action upon the policy.

On September 30, 1901, the insured's attorney wrote to the insurer's attorney requesting that a stipulation be given extending the time to bring an action until thirty days after the completion of the appraisal, to which the insurer's attorney replied that no action could be brought until the lapse of sixty days after the appraisers had made the award, and that no stipulation was necessary to protect the insured.

Held, that the plaintiff was not justified in abandoning the appraisal proceedings and in resorting to an action to recover the amount of his loss;

That the defendant had not waived its right to an appraisal of the loss;

That the plaintiff would not have lost his right of action upon the expiration of twelve months from the time of the fire;

That, under the policy, if an appraisal was had, an action could not be brought upon the policy until sixty days after the appraisers' award, but that, in the absence of any reason for extending the time growing out of the appraisal, the action must be brought within one year;

That the defendant had effectually estopped itself from asserting the force of the provision requiring the bringing of the action within twelve months after the fire.

APPEAL by the defendant, The German Insurance Company, from a judgment of the Supreme Court in favor of the plaintiff, entered

in the office of the clerk of the county of Oneida on the 6th day of April, 1903, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 6th day of April, 1903, denying the defendant's motion for a new trial made upon the minutes.

Seward A. Simons, for the appellant.

Richard R. Martin, for the respondent.

STOVER, J.:

This action was brought upon a policy of insurance containing a use and occupancy clause. The policy contained these provisions: "This company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any requirement, act or proceeding on its part relating to the appraisal, or to any examination herein provided for, and the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

The provision as to appraisal is as follows:

"In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire, and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expenses of the appraisal and umpire."

By another clause of the policy it was provided: "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

A fire causing loss under the policy occurred on October 9, 1900. Proof of loss was filed by the insured, and an offer of appraisal was made. On August 8, 1901, an agreement to submit to appraisers

was made, by which it was agreed that the matter in difference should be submitted to two appraisers named, and that the two appraisers named should select an umpire, all under and in compliance with the above-quoted clause of the policy relating to appraisal. The appraiser named by the insured was not able to proceed at once when requested, and, without any fault of either party, a meeting of appraisers was not had until October 7, 1901, at which time the appraisers met and looked over the property, but did not choose an umpire; but, upon separating, agreed to make inquiries as to several names submitted, so as to be able to choose. Before another meeting of the appraisers, and on the 8th day of October, 1901, this action was commenced.

On September 30, 1901, plaintiff's attorney wrote to defendant's attorney requesting that a stipulation be given extending the time to bring action until thirty days after completion of appraisal, to which defendant's attorney replied by telegram and letter that the policy protected the insured, and provided that no action could be brought until the lapse of sixty days after the award by the appraisers, and that no stipulation was necessary to protect plaintiff.

We think the principle involved in *Silver* v. *Western Assurance Company* (164 N. Y. 381) is applicable to this case; that is, that when an agreement to submit to appraisal has been entered into, both parties are bound to act in good faith, and when there is no evidence that the insurer is acting in bad faith, either in the execution of the agreement or for the purpose of defeating its object, the insured is not justified in abandoning the proceedings and resorting to an action to recover the amount of the loss. It is claimed that the insurer waived its rights to an appraisal, and the trial court submitted to the jury the question "Did the defendant waive its rights to an appraisal under the policy and under the agreement for appraisal set out in the complaint in the second count?" and the jury found affirmatively upon this question. We think this was error. There is no evidence in the case upon which it could be said that defendant had waived its rights. Upon the contrary, it was proceeding in carrying out the appraisal. It was not responsible for the delay in making the agreement, from October to August, and after the making of the agreement it was the plaintiff's appraiser who was unable for several weeks to attend to the business of

appraisal. An examination of the evidence does not disclose anything upon which a finding of waiver can be based.

But it is claimed that plaintiff would have lost his right of action upon the expiration of twelve months from the time of the fire. We do not think this well founded.

The apparent inconsistency between the provisions of the policy as to beginning an action within twelve months after the fire and the one providing that an action shall not be brought until sixty days after an award by appraisers, disappears when considered as applicable to different conditions. So they may be construed as meaning that in the event of appraisal the time is extended until sixty days after an award; but in the absence of any reason for extending, growing out of the appraisal, the action must be brought within one year.

Under the evidence in this case no action could be brought until after sixty days from the making of the award. We are not now considering the effect of the bad faith of either party, or any circumstances that might defeat the making of an award, for the reason, as above stated, that the evidence does not disclose any fact upon which such consideration can be based. And while there might be cases in which an appraisal might be abandoned, none is suggested by the evidence here.

The waiver, if any is to be predicated upon the testimony, was of the limitation to twelve months, both by necessary inference from the acts of the parties, and by the actual notice given by the attorney when asked for a stipulation extending the time. Defendant had construed that clause as not effective, and had effectually estopped itself from asserting its force.

Having entered into the agreement of appraisal, both parties were bound to proceed in good faith, and the insured, as well as the insurer, was bound to proceed to an award, and to do nothing to prevent a determination.

We do not discuss other questions presented on the appeal, as the judgment must be reversed for the foregoing reasons.

All concurred.

Judgment and order reversed and new trial granted, with costs to the appellant to abide event upon questions of law only.

HARVARD BREWING COMPANY, Appellant, v. ARTHUR G. SPERBER and Others, Respondents.

Bond, guaranteeing the payment of goods sold on credit, given to replace a defective bond — the liability thereunder embraces not only the sales subsequent, but those prior to its delivery.

On March 11, 1901, Arthur G. Sperber, a bottler and dealer in malt liquors, entered into an agreement with a brewing company, by which he agreed to purchase, bottle and sell the goods of the brewing company exclusively. The contract contained the following provision: "The party of the second part (Arthur G. Sperber) hereby agrees to furnish a good and sufficient bond with two sureties, in the sum of three thousand dollars ($3,000), to guarantee the said party of the first part (the brewing company) against all loss from the sale of said products, and from any credit that may be extended or money advanced by the party of the first part, in the establishment of the business of the party of the second part."

On the same day the bond provided for in the contract was delivered to the brewing company. After the lapse of several months it was found that the bond was defective in that it did not specify the penalty thereof. For that reason alone the original bond was surrendered to Sperber on May 6, 1902, and a new bond was executed, which contained the same recitals and conditions as the original bond with the exception that it provided the penalty. The new bond provided as follows: "WHEREAS, Arthur G. Sperber is engaged in the bottling and wholesaling of malt liquors in the city of Rochester, State of New York, and wishes to continue to purchase beer and malt liquors of the Harvard Brewing Company of Lowell, Commonwealth of Massachusetts, and purchased the same upon credit from time to time, in accordance with the terms of an agreement made the 11th day of March, 1901, and duly executed by the said Harvard Brewing Company and the said Arthur G. Sperber; and

"WHEREAS, said Arthur G. Sperber is indebted to said Brewing Company and desires to obtain credit for the purchase of said malt liquors of the Harvard Brewing Company.

"Now, therefore, the condition of the obligation is such that if the bounden Arthur G. Sperber shall pay and liquidate for all beers and liquors furnished by the said Harvard Brewing Company that he purchases from time to time, and shall faithfully live up to * * * the terms of the aforesaid agreement made and executed the 11th day of March, 1901, and refund all moneys which may be advanced by the said Harvard Brewing Company, or moneys or credits extended to him according to this obligation, then this obligation is to be void, otherwise to remain in full force, virtue and effect."

Held, that the sureties upon the new bond were liable to the extent of the penalty thereof, not only for the indebtedness incurred by Sperber to the brewing com-

pany subsequent to the execution of the new bond, but also for the indebtedness incurred by him to the brewing company after the making of the contract and prior to the execution of the new bond.

APPEAL by the plaintiff, the Harvard Brewing Company, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Monroe on the 4th day of September, 1903, upon the decision of the court, rendered after a trial at the Monroe Trial Term, a jury having been waived.

The action was commenced January 22, 1903, to recover the sum of $3,000 upon a bond executed by the defendant Arthur G. Sperber, as principal, and by his codefendants as sureties, bearing date the 29th day of April, 1902.

Porter M. French, for the appellant.

C. C. Werner, for the respondents.

McLENNAN, P. J.:

The plaintiff, a foreign corporation, is engaged in the manufacture and sale of ales and beers. The defendant Arthur G. Sperber, at the times hereinafter mentioned, was engaged in the business of bottling and selling to the trade malt liquors at Rochester, N. Y. On the 11th day of March, 1901, he entered into an agreement with the Harvard Brewing Company, in writing, by which he agreed to purchase goods manufactured by the plaintiff, at certain prices, and to bottle and sell such goods exclusively. His agreement also contained the following provision: "The party of the second part (the defendant Arthur G. Sperber) hereby agrees to furnish a good and sufficient bond with two sureties, in the sum of three thousand dollars ($3,000), to guarantee the said party of the first part (plaintiff) against all loss from the sale of said products, and from any credit that may be extended or money advanced by the party of the first part, in the establishment of the business of the party of the second part."

The learned trial court found that on or about the date of the execution of said agreement, to wit, the 11th day of March, 1901, the defendants, pursuant to the provisions of said agreement, executed and delivered to the plaintiff their certain bond, the con-

ditions of which were identical with those of the bond upon which this action is founded; that after the lapse of several months, and shortly before the execution and delivery of the bond in suit, it was discovered that the bond first delivered was defective in that it did not specify the penalty thereof, and that for that reason alone, on the 6th day of May, 1902, the same was surrendered to the defendant Arthur G. Sperber, and that thereupon the defendants executed and delivered to the plaintiff the bond in suit, the recitals and conditions of which, so far as material in this discussion, read as follows:

"WHEREAS, Arthur G. Sperber is engaged in the bottling and wholesaling of malt liquors in the city of Rochester, State of New York, and wishes to continue to purchase beer and malt liquors of the Harvard Brewing Company of Lowell, Commonwealth of Massachusetts, and purchased the same upon credit from time to time, in accordance with the terms of an agreement made the 11th day of March, 1901, and duly executed by the said Harvard Brewing Company and the said Arthur G. Sperber; and

"WHEREAS, said Arthur G. Sperber is indebted to said Brewing Company and desires to obtain credit for the purchase of said malt liquors of the Harvard Brewing Company.

"Now, therefore, the condition of the obligation is such that if the bounden Arthur G. Sperber shall pay and liquidate for all beers and liquors furnished by the said Harvard Brewing Company that he purchases from time to time, and shall faithfully live up to * * * the terms of the aforesaid agreement made and executed the 11th day of March, 1901, and refund all moneys which may be advanced by the said Harvard Brewing Company, or moneys or credits extended to him according to this obligation, then this obligation is to be void, otherwise to remain in full force, virtue and effect."

The trial court also found that between the date of the said agreement and the 6th day of May, 1902, the date of the delivery of the bond in suit, the plaintiff sold to the defendant Arthur G. Sperber goods to the amount of $4,569.31, no part of which has been paid; and also that the plaintiff sold and delivered to said Arthur G. Sperber, pursuant to the agreement between the parties, between the 6th day of May, 1902, and the 12th day of December,

1902, goods amounting to $2,248.91, to apply upon which certain sums had been specifically paid, amounting to the sum of $1,018.60, leaving due and unpaid thereon a balance of $1,230.31.

In his conclusions of law the learned trial justice determined that the defendants are not liable upon the bond in suit, for any indebtedness of the defendant Arthur G. Sperber, for goods sold and delivered to him pursuant to said agreement, prior to the said 6th day of May, 1902, and that their liability must be held to cover only such debts and obligations of said defendant as were incurred pursuant to said agreement from and after said date, and awarded judgment for the plaintiff for the unpaid balance of such indebtedness, to wit, $1,230.31, together with costs of the action.

The plaintiff duly excepted to such conclusions, and the question involved therein is now before this court.

A reading of the agreement, pursuant to which all the purchases and sales of goods between Sperber and the plaintiff were made, and particularly the provision thereof above quoted, shows that it contemplated that at some time in the future a "good and sufficient bond with two sureties, in the sum of three thousand dollars" should be executed and delivered to the plaintiff to protect it against loss upon *any* and *all* obligations of Arthur G. Sperber, contracted pursuant to said agreement. The trial court found as a fact that in furtherance of such agreement the defendants did furnish a bond containing the same recitals and conditions found in the bond in suit, but that the same was not "good and sufficient," but was defective in that it failed to express the penalty for which the obligors were to be bound; that the same was for that reason thereafter surrendered to the principal obligor, who delivered to the plaintiff in exchange therefor the bond upon which this action was brought, which differs from the one originally delivered only in the single feature wherein the same was defective.

There is no provision in the last-mentioned instrument by which the obligors sought to limit their liability to the debts and obligations incurred by the principal subsequent to the execution and delivery thereof; but, upon the contrary, the same recites the fact that "Arthur G. Sperber *is* engaged" in bottling and selling malt liquors, "and purchased the same upon credit from time to time, in accordance with the terms of an agreement made the 11th day of

March, 1901; * * *" and further, "whereas, said Arthur G. Sperber *is* indebted to said Brewing Company and desires to obtain credit for the purchase of said malt liquors." After such recitals of facts, which were subsequently found by the trial court, the instrument expresses the condition of the obligation to be that "Arthur G. Sperber shall pay and liquidate for all beers and liquors furnished by the said Harvard Brewing Company * * * and shall faithfully live up to * * * the terms of the aforesaid agreement, * * * and refund all moneys which may be advanced by the said Harvard Brewing Company or moneys or credits extended to him. * * *"

As we read the contract of the obligors we are unable to see wherein it warrants the conclusion that it does not *in terms* embrace all liabilities of the principal, incurred pursuant to the agreement therein referred to, to the extent of $3,000.

In *Belloni* v. *Freeborn* (63 N. Y. 383, 388) the court, in declaring the obligations of sureties, uses this language: "In guarantees, letters of credit and other obligations of sureties, the terms used and the language employed are to have a reasonable interpretation according to the intent of the parties as disclosed by the instrument, read in the light of the surrounding circumstances and the purposes for which it was made, * * * and if the surety has left anything ambiguous in his expressions the ambiguity (should) be taken most strongly against him."

If there be any question as to the construction to be given the bond in question the language employed by the parties must be interpreted by the court "in the light of the surrounding circumstances and the purposes for which it was made."

From the facts found by the trial court respecting the execution, delivery and surrender of the first bond and the execution and delivery of the bond in suit, the only inference deducible is that the latter instrument was executed and delivered by the defendants with the purpose and intent of substituting it for the former, and that the indemnity which was thereby sought to be afforded the plaintiff was for all obligations of the principal incurred in accordance with the agreement between him and the plaintiff and which would have been embraced within the terms of the original bond. A different conclusion would impugn the good faith and honesty of the defend-

ants and charge them with an act of duplicity by which they should not be permitted to profit.

These considerations lead to the conclusion that the learned trial court committed error in limiting the liability of the defendants to those items of indebtedness contracted by Arthur G. Sperber subsequent to the execution and delivery of the bond in suit, and that the plaintiff should have been awarded judgment against the defendants for the total unpaid indebtedness of said Sperber up to the amount of indemnity provided by said bond, to wit, the sum of $3,000.

All concurred.

Judgment reversed and new trial ordered, with costs to appellant to abide event, upon questions of law only, the facts having been examined and no error found therein.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. ADELBERT SNYDER, Respondent, Impleaded with WILLIS VAN AERNAM.

A person indicted for burning a fallow in violation of section 229 of the Forest, Fish and Game Law may, after being acquitted, be sued for the penalty provided in that section — the defendant's intent is immaterial.

The trial and acquittal of a person indicted under section 229 of the Forest, Fish and Game Law (Laws of 1900, chap. 20), which prohibits the burning of fallows, stumps, etc., during certain periods of the year, and further provides: "Any person violating any provision of this section is guilty of a misdemeanor, and in addition thereto is liable to a penalty of three hundred dollars," does not constitute a bar to the maintenance of a civil action by the People of the State of New York against such person to recover the penalty provided in that section.

WILLIAMS and STOVER, JJ., dissented.

An action for the penalty prescribed in this section is a civil action pure and simple, and the question of the defendant's intent is not a necessary feature of the plaintiff's case.

APPEAL by the plaintiff, The People of the State of New York, from so much of a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Lewis on the 23d day of April, 1903, as was entered upon the

dismissal of the complaint by direction of the court as to the defendant Snyder, after a trial at the Lewis County Trial Term, and also from so much of an order entered in said clerk's office on the 27th day of April, 1903, as denies the plaintiff's motion for a new trial as to the defendant Snyder, made upon the minutes.

C. S. Mereness, for the appellant.

Ryel & Merrell, for the respondent.

SPRING, J.:

The defendant and one Van Aernam were sued for a penalty in burning a fallow in violation of section 229 of the Forest, Fish and Game Law (Laws of 1900, chap. 20). The record shows that the defendant Snyder had been indicted, tried and acquitted for the same acts which constituted the cause of action. Upon the presentation of the record of acquittal the complaint was dismissed as to him and the jury acquitted Van Aernam. The People appeal only from the judgment of dismissal, and the single question up for review is whether the judgment of acquittal is a bar to the action by the People to recover the penalty which the section provides.

Section 229, after prohibiting the burning of fallows, stumps, etc., during certain periods of the year, prescribes: "Any person violating any provision of this section is guilty of a misdemeanor, and in addition thereto is liable to a penalty of three hundred dollars."

Two distinct remedies are allowable against one violating the provisions of this section of the act. One to obtain the punishment of the offender for committing a misdemeanor, and the other a civil action to recover the penalty. This method of double punishment of offenders guilty of misdemeanors has long been much in vogue by various statutes in this State. For instance, chapter 628 of the Laws of 1857 (Excise Law); section 21 of chapter 534 of the Laws of 1879 (fishing out of season); section 19 of chapter 183 of the Laws of 1885 (deception in sales of dairy products).

At the outset it will be noted that the conviction or acquittal in the criminal action would not be conclusive against one who has sustained damages by the acts which compose the criminal charge. From the early history of the State this has been made so by statute. (*Newton* v. *Porter*, 5 Lans. 416, 423.) The Code of Civil Procedure

in a sweeping section (1899) provides that civil and criminal prosecutions do not merge. (See, also, sections 8 and 13 of that Code as to criminal contempts.)

The contention here, however, is founded largely upon the facts that the two remedies are prosecuted in the name of the People, and the suit for the penalty is *quasi* criminal in character. They are, however, entirely independent, and one is a criminal and the other a civil action. The rules governing the trials in the two cases are dissimilar. In the criminal action the evidence must satisfy the jury of the guilt of the defendant beyond a reasonable doubt. The taking of the evidence of a non-resident witness by commission at the instance of the People is not permissible in a criminal prosecution. The manner of eliciting proof is more restricted and the district attorney in presenting the case to the jury must keep in a more narrow groove than the counsel in a civil action. (*People* v. *Fielding*, 158 N. Y. 542, 547; *People* v. *Milks*, 55 App. Div. 372.) The jury without any departure from the strict letter of the law or from any misapprehension of the evidence might acquit in a criminal action and upon the same proof and with equal propriety render a verdict for the amount of the penalty.

The authorities in this State as far as our research has extended are uniform in holding that the two actions are not at all dependent upon each other. In *People* v. *Rohrs* (49 Hun, 150) the action was to recover penalties pursuant to chapter 183 of the Laws of 1885, entitled "An act to prevent deception in the sale of dairy products." The act made the offender guilty of a misdemeanor punishable by fine or imprisonment and in addition thereto provided that he should forfeit and pay a penalty of $500. The statute, it will be observed, is almost identical with the one under consideration. The defendants offered to prove that the defendant Rohrs had been tried and acquitted for the offense set out in the complaint, but the evidence was excluded. Upon appeal the court sustained this ruling saying (at p. 150): "The parties to the criminal proceeding were the People, the plaintiffs in this action, and Rohrs, one of the defendants in this action. The question litigated in the criminal proceeding was whether or not Rohrs had violated the statute. It was judicially determined that he had not so done.

It would seem, therefore, that the very question to be tried in this action had already been litigated between the parties and determined in the defendant Rohrs' favor. The difficulty, however, in holding that the result in the criminal proceeding estopped the People from trying the question of Rohrs' violation of the statute in this action, arises from the fact that if Rohrs had been found guilty in the criminal action, the record in that action would not have been evidence against Rohrs in this action, and, therefore, because of the want of mutuality, no estoppel can arise." In *People* v. *Stevens* (13 Wend. 341) the defendant was indicted for selling liquor without a license. He pleaded in bar a judgment in a civil action for a penalty for the same offense. The district attorney demurred to the plea and it was held bad by the Court of Sessions and upon appeal the judgment sustaining the demurrer was affirmed. The court say (at p. 342): "It is undoubtedly competent for the Legislature to subject any particular offense both to a penalty and a criminal prosecution; it is not punishing the same offense twice. They are but parts of one punishment; they both constitute *the* punishment which the law inflicts upon the offense. That they are enforced in different modes of proceeding, and at different times, does not affect the principle. It might as well be contended that a man was punished twice when he was both fined and imprisoned, which he may be in most misdemeanors." In *People* v. *Meakim* (133 N. Y. 214) the court quoted the above excerpt from the *Stevens* case approvingly (p. 224) and an analysis of the authorities is there given and the conclusion reached that the two remedies may be followed and the adoption of the one is not exclusive of the other. *Blatchley* v. *Moser* (15 Wend. 215); *Rollins* v. *Breed* (54 Hun, 485) and *Behan* v. *People* (17 N. Y. 516) are along the same line. The text books announce the same principle. (1 Greenl. Ev. [15th ed.] § 537; Whart. Ev. § 777; 24 Am. & Eng. Ency. of Law [2d ed.], 831.)

We are aware that the contrary principle has been maintained in *Coffey* v. *United States* (116 U. S. 436), but as the policy of the courts of our own State has been so consistent and uniform in the direction indicated we feel bound to follow them. The chief reason urged by the United States Supreme Court for the adoption of the doctrine that the two remedies cannot both be pursued is that the suit

for the penalty is in effect criminal in its character. As has been seen, that principle does not obtain in our State, but the action for a penalty is treated like any other civil action.

In *Stone* v. *United States* (167 U. S. 178) the *Coffey* case was in a measure limited. The *Stone* case was an action of conversion and the defendant Stone had been acquitted on an indictment in the United States District Court for the same offense which was made the basis of the civil action also prosecuted in the name of the United States. The defendant pleaded the judgment of acquittal in bar of the civil action, but the court of last resort held against him. After distinguishing the *Coffey* case, the court said (at p. 188): "The rule established in *Coffey's* case can have no application in a civil case not involving any question of criminal intent or of forfeiture for prohibited acts, but turning wholly upon an issue as to the ownership of property. In the criminal case the government sought to punish a criminal offense while in the civil case it only seeks in its capacity as owner of property, illegally converted, to recover its value. In the criminal case his acquittal may have been due to the fact that the government failed to show, beyond a reasonable doubt, the existence of some fact essential to establish the offense charged, while the same evidence in a civil action brought to recover the value of the property illegally converted might have been sufficient to entitle the government to a verdict. Not only was a greater degree of proof requisite to support the indictment than is sufficient to sustain a civil action; but an essential fact had to be proved in the criminal case, which was not necessary to be proved in the present suit. In order to convict the defendant upon the indictment for unlawfully, willfully and feloniously cutting and removing timber from lands of the United States, it was necessary to prove a criminal intent on his part, or at least that he knew the timber to be the property of the United States."

The action for a penalty is a civil one, pure and simple, and the question of the defendant's intent is not a necessary feature of the plaintiff's case. (*People* v. *Kibler*, 106 N. Y. 321; *People* v. *Laesser*, 79 App. Div. 384.) The plaintiff made his *prima facie* case by proving that the defendant burned the fallow within the prohibited period. Whether done negligently, with malicious intent or in a spirit of sport is unimportant. If the maintenance of the

action depended upon proving that the defendant set the fire maliciously or with intent to do damage to his neighbor, the statute might be nullified.

Whether the action for the penalty is to be sued for in the name of the People or of an informer or of an official, it is still a civil remedy by the statute. The test is not that the civil action is in form prosecuted in the name of the People which would make it objectionable. The criticism indulged is that the action is authorized if at all after the other remedy allowed by the statute has been resorted to. The doctrine upon which the cases in our State rest gives no room for this technical construction. They proceed upon the ground that the remedies are separate and were so intended by the lawmakers. Neither upon principle nor authority do we regard the one as a bar to the maintenance of the concurrent or independent remedy.

Nor does the determination reached result in putting the defendant twice in jeopardy for the same offense within the proper meaning of that phrase. (Const. art. 1, § 6.) He had been once tried on an indictment where different inferences, a different mode of procedure, a different rule as to the competency of witnesses prevail from what are allowable in the civil action.

It was not necessary to obtain the conviction of the defendant before resorting to the penalty. (*People* v. *Waterbury*, 44 Hun, 493.)

The judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

All concurred, except WILLIAMS, J., dissenting in an opinion in which STOVER, J., concurred.

WILLIAMS, J. (dissenting):

The judgment and order should be affirmed, with costs.

The action was brought to recover a penalty of $300 for burning logs, etc., in a fallow, at a time of year prohibited by section 229 of the Forest, Fish and Game Law (Laws of 1900, chap. 20). That section provides: "Any person violating any provision of this section is guilty of a misdemeanor, and *in addition thereto* is liable to a penalty of three hundred dollars." The defendant appellant was arrested for a misdemeanor under this statute, pleaded not

guilty, and upon his trial therefor was acquitted. This action was based upon the same prohibited act for which he was tried and acquitted. The trial court held the acquittal on trial for the misdemeanor was a bar to a recovery of the penalty, and the correctness of this ruling is the only question involved in this appeal.

We do not think it necessary to enter upon any discussion of the question involved, inasmuch as there are at least two cases reported which involve practically the same question and which are directly in conflict with each other. (*People* v. *Rohrs*, 49 Hun, 150; *Coffey* v. *United States*, 116 U. S. 436; approved in *Stone* v. *United States*, 167 id. 178.)

The *Rohrs* case was decided by the first department, General Term, in 1888. The *Coffey* case was decided in 1886, and was approved in the *Stone* case in 1897. The rule of law laid down in the *Coffey* case was that adopted by the trial court in the present case, and seems to have been well considered and to be the settled law of the United States Supreme Court. The opinion in the *Rohrs* case was a per curiam one, and the attention of the General Term was not apparently called to the *Coffey* case or the reasoning of the court upon which that case was determined. The General Term held the former acquittal was not a bar to the recovery of the penalty.

We think, under this condition of the decisions, that we should follow the rule laid down in the United States Supreme Court, and that the judgment and order should, therefore, be affirmed, with costs.

STOVER, J., concurred.

Judgment and order reversed and new trial ordered, with costs to the appellant to abide event.

JOHN GOWANS and Others, Appellants, v. FRANCES JOBBINS, as Ancillary Executrix, etc., of WILLIAM F. JOBBINS, Deceased, Respondent.

Bill of particulars — when not required where documentary proof on the subject is in the possession of the party applying for it — election between two causes of action, one for an accounting under a contract and the other for its cancellation.

In an action brought against one Jobbins it appeared that the plaintiffs, who were soap manufacturers, entered into a contract with the defendant, who claimed to own a valuable process for refining crude glycerine extracted from waste lye, whereby the plaintiffs agreed to concentrate crude glycerine from soap lye and send it to Jobbins, who was to refine and sell it and pay half of the net avails to the plaintiffs. The agreement provided that it should continue in force only as long as Jobbins fulfilled his obligations to the plaintiffs.

The complaint set forth two causes of action. The first charged that the defendant accounted to the plaintiffs for only ninety per cent of the glycerine extracted from the crude product and made false reports to the plaintiffs concealing the actual amount of the money realized upon the sale of the refined glycerine, and prayed for an accounting.

The second cause of action charged that the defendant falsely represented that he possessed the requisite skill necessary for refining the crude glycerine. It also reiterated the allegations respecting the failure of the defendant to account properly for the avails of the sales and asked for the cancellation or termination of the contract by reason of such failure and for an accounting.

Held, that it was improper for the court to require the plaintiffs to elect upon which of the two causes of action they would proceed, as such causes of action were not inconsistent and might properly be disposed of in a single equitable action;

That the plaintiffs should not be required to make a more definite statement in their complaint, or to serve a bill of particulars before issue had been joined, specifying wherein the statements delivered to the plaintiffs by the defendant were false or incorrect, and wherein the defendant failed to report correctly the sums actually received, and matters of a kindred nature, as the documentary proof bearing upon these questions was in the possession of the defendant;

That the plaintiffs should not be required, before answer, to furnish a bill of particulars as to the chemical tests made, although such relief might be proper after the action was at issue.

APPEAL by the plaintiffs, John Gowans and others, from an order of the Supreme Court, made at the Erie Special Term and entered in the office of the clerk of the county of Erie on the 27th day of April, 1903, directing the plaintiffs to make the amended complaint more definite and certain, striking out certain parts thereof, and

requiring them to elect upon which cause of action they will proceed.

Adelbert Moot, for the appellants.

Seward A. Simons, for the respondent.

SPRING, J.:

The plaintiffs are soap manufacturers in the city of Buffalo, and in 1896 and thereafter Jobbins & Van Ruymbeke were chemical manufacturers in Illinois. The latter claimed to own a valuable process for refining crude glycerine extracted from waste lye.

The two firms entered into a written agreement which is attached to the complaint, whereby the plaintiffs were to concentrate the crude glycerine from the soap lye, send it to the manufacturers in Illinois, who were to refine it and sell it and pay over to the plaintiffs one-half of the avails, less expenses, set out in the agreement. The agreement was of the date of January 4, 1896, and the parties have since been operating under it. Van Ruymbeke assigned his interest to his copartner, Jobbins. The latter died since the commencement of the action and his executrix has been substituted as defendant.

The complaint contains two distinct causes of action. The first, after a recital of the facts, charges in substance that the defendant accounted and paid over to the plaintiffs only ninety per cent of the glycerine extracted from the crude product and falsely reported and made incorrect statements to the plaintiffs upon that basis, concealing the amount of glycerine which they recovered and the actual amount of money which they received from the sales of the product, and asks for an accounting.

The court below has stricken out certain allegations and required a bill of particulars, or that the complaint definitely state in detail as to certain other facts or averments contained in the complaint. The cause of action as a whole is clearly enough set out so that the defendant can apprehend precisely with what she is charged, and the allegations eliminated by the order are so interwoven with pertinent allegations that to strike them out in a measure weakens the force of the facts which the pleader is endeavoring to state. The bill of particulars ordered pertains to requiring information as to

the particulars wherein the statements of the defendant's predecessors were false or incorrect, wherein they failed to report the sums actually received, and matters of a kindred nature. All of these facts are peculiarly within the knowledge of the defendant. The books of account, the shipping and other bills, the data, documentary in form, must necessarily be in the possession of the defendant. At this stage of the case at least, with no issue joined, the plaintiffs ought not to be required to give information which they cannot have and which they allege they cannot state in detail. From the nature of the cause of action the plaintiffs are likely to be largely dependent upon the books of account and other documentary proof which are in the custody of the defendant and to the inspection of which they may be entitled by reason of the joint interest of the parties in the venture and its profits.

We think the court erred in requiring the plaintiffs either to state definitely in the complaint these facts or accompany the pleading with a bill of particulars furnishing this information.

The second cause of action is founded upon a different theory. By the terms of the agreement of the parties Jobbins & Van Ruymbeke, as noted, were to refine this glycerine product, and the agreement was to continue in force "and be binding upon each party to the other party so long as the said first party (Jobbins & Van Ruymbeke) faithfully fulfill their within named obligations to the said second party (plaintiffs herein)."

The complaint charges that Jobbins & Van Ruymbeke represented they possessed skill as chemists and that their patent process would concentrate the crude glycerine from the waste soap lyes and refine the product, so that the glycerine, which was the valuable result of the process could be extracted, and further that the plaintiffs relied upon these representations. The complaint avers that said firm did not possess the requisite skill in refining the crude increment. This count contains the allegations reiterated of the failure to account properly for the avails of the sales and asks for the cancellation or termination of the contract by reason of such failure upon the part of the defendant to comply with its terms and for an accounting.

The court at Special Term has required the plaintiffs to elect upon which of these causes of action they will proceed. We do

not regard them as inconsistent. The cancellation of the contract and the sale of the joint property might follow as a natural incident of findings establishing that the defendant had falsely reported its sales to the injury of the plaintiffs and that she or her predecessors in interest have substantially failed to perform the agreement. A new action could be commenced based upon such findings of a substantial failure to meet the obligations assumed in the agreement, but all the rights of the parties can be taken care of in the one equitable action instead of commencing anew.

In order to comprehend this cause of action or to make it complete or consistent it is not necessary to strike out the allegations which have been eliminated by the order appealed from.

Nor do we deem it judicious at this stage of the case to compel plaintiffs to furnish a bill of particulars as to the chemical tests made or as to any of the other matters set out in this cause of action. The bill of particulars cannot be important to enable the defendant to answer. It may be that, after the parties have defined their issues by their pleadings, this relief will be proper, but not at present.

The order should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

All concurred.

Order reversed, with ten dollars costs and disbursements.

NORA O'CONNOR, Respondent, v. PATRICK HENDRICK, as Sole Trustee of School District No. 9, Town of Lima, Livingston County, Respondent.

CHARLES D. MINER and Others, Appellants.

Application to intervene in an action by a teacher against a trustee of a school district alleged to be acting collusively — condition imposed that the intervening parties appear by the trustee's attorney — condition stricken out and the intervening parties required to stipulate not to tax costs against the plaintiff.

An action having been brought against the trustee of a school district, to recover compensation for services alleged to have been rendered by the plaintiff and by her assignor as school teachers in the public school in such district, owners of property within the school district made a motion under section 452 of the

Code of Civil Procedure to be allowed to intervene in the action, upon the ground that the plaintiff and the defendant trustee were acting collusively, and that the trustee would not properly, and in good faith, defend the action and protect the interest of the moving parties.

The trustee alone opposed the motion. The court granted the motion on condition that the moving parties would appear and defend the action through the attorney retained by the trustee. Neither the plaintiff nor the trustee appealed from the order. The moving parties took an appeal from so much thereof as imposed the condition.

Held, that as neither the plaintiff nor the trustee had appealed from that portion of the order allowing the moving parties to intervene, the question whether the latter were entitled to intervene was not before the appellate court;

That it was not proper to require the moving parties, as a condition of being allowed to intervene, to employ the attorney retained by the trustee;

That this condition should be stricken from the order and the remainder of the order be permitted to stand;

That the court would not reverse the entire order on the theory that the respondents might have been willing to accept the order containing the condition and, therefore, did not appeal therefrom, but would not be satisfied with the order without the condition;

That the court would, however, require the intervening defendants to stipulate that in the event of their success they would not tax costs against the plaintiff.

MCLENNAN, P. J., and STOVER, J., dissented.

APPEAL by Charles D. Miner and others, third parties, from so much of an order of the Supreme Court, made at the Livingston Special Term, bearing date the 7th day of November, 1903, and entered in the office of the clerk of the county of Livingston, as requires, as a condition of allowing them to intervene and become parties to this action, that they appear and defend the action through the same attorney retained and employed by the defendant Hendrick.

Albert H. Stearns, for the appellants.

Timothy J. Nighan, for the respondent O'Connor.

Fletcher C. Peck, for the respondent Hendrick.

HISCOCK, J.:

We think that the portion of the order imposing the condition above mentioned and appealed from was erroneous.

This action was brought by plaintiff to recover for services claimed to have been rendered both by herself, and by another who assigned

to her, as school teachers in the public schools of district No. 9 of the town of Lima.

The appellants made a motion to be allowed to intervene and become parties defendant in the action, under the provision of section 452 of the Code of Civil Procedure, upon the grounds, in substance, that they were the owners of real property within said school district which would be affected in case judgment was recovered by the plaintiff, and that the plaintiff and defendant trustee were so acting collusively that the latter would not properly and in good faith defend this action and protect the interests of the appellants.

As appears by the recitals in the order made upon said motion no opposition whatever was offered by the plaintiff thereto. The defendant trustee did appear and through his present attorney opposed the granting of said motion. The motion was, however, after due consideration, granted, but upon the condition already referred to.

We do not feel that the original underlying question of the right of defendants to be made parties to this action is before us upon this appeal. As already stated, the plaintiff did not upon the motion oppose said application, and the learned counsel for the respondent trustee has not, as it seems to us, questioned in his brief the right of the appellants to be made parties, if the court at Special Term, in the exercise of its discretion, deemed it proper to make them such. Moreover, no appeal has been taken from that portion of the order bringing them in.

Assuming, therefore, as we must under these conditions, that the appellants have been properly and rightfully made parties, we simply have before us the query whether it was proper to impose upon them, as a condition of coming in, that they should employ the attorney for the respondent trustee, whose acts and conduct they are criticizing and accusing.

We think it very clear that we must answer this question in the negative, and assert the law to be that such condition should not have been imposed. (*Jemmison* v. *Kennedy*, 55 Hun, 47.)

Courts have very uniformly and steadfastly secured to clients the right, under all reasonable conditions, to select and change at will their attorneys, and this rule has been deemed essential to the

preservation of those confidential relations which ought to prevail between counsel and client. (*Tenney* v. *Berger*, 93 N. Y. 524; *Matter of Paschal*, 10 Wall. 483; *Matter of Prospect Avenue*, 85 Hun, 257.)

But while no such argument is addressed to us by the briefs of the counsel for the respondents, it is nevertheless suggested that, reaching the conclusion above indicated as to the condition imposed, we still ought not to reverse the order in this respect and leave it otherwise standing and in force; that the respondents may have been willing to accept and, therefore, not appeal from the order as a whole and while containing the condition already referred to, and that this being so it will be unfair and inequitable to leave them without remedy as against the order when modified by striking out said portion thereof. Answering this suggestion, it seems to us that in the first place it may be said that respondents received ample warning that this very result might happen. The notice of appeal served by appellants pointed specifically to this provision and portion of the order as the one, and the only one, of which they would endeavor to secure a reversal, and respondents, therefore, might very properly assume that, in the absence of any appeal by them from other portions of the order, the precise result might follow which now seems imminent.

We prefer, however, not to dispose of the suggestions made and now under consideration upon this ground alone, but to measure our proposed action by the test of fairness and justice to the respondents who have not appealed, and who will find themselves governed by a modified form of the original order. We do not see how, under the circumstances of this case, such result is to be either unjust to them or burdensome upon them. Upon the other hand, we think that it will be entirely beneficial to and proper for all the parties interested.

As already suggested, this action is brought by plaintiff to recover for services alleged to have been performed in teaching in the public schools in the town of Lima. In opposition to her right to recover it is urged that she and her assignor have violated those rules of the Department of Public Instruction of this State which rest upon the provisions of the Constitution itself, and forbid that teachers in public schools shall wear any distinctive or distinguishing dress denoting

membership in any religious order to which they belong, and that they shall not seek to utilize their position as teachers to press and urge upon the minds of children under their care, the religious tenets and doctrine of any sect. It is said that plaintiff and her assignor, while engaged in the pursuit of their duties as teachers, wore the distinctive and distinguishing dress of the religious order of sisterhood, known as the "Sisters of St. Joseph," to which they belonged, and that before and after school hours, while performing their said duties, they taught the religious principles and doctrines of their order.

It is asserted that these acts, especially when viewed in the light of various rulings and orders made by the Superintendent of Public Instruction, furnish a defense to the claim in suit.

Appellants then by their affidavits vigorously and pointedly attack the attitude of the defendant trustee in this controversy which has apparently been running some time. They accuse him, through the allegation of specific acts, of an indifference if not hostility to the principle that our public schools shall not be subjected by any sect to religious domination, and which in effect has been safeguarded by our Constitution. It is true that the trustee endeavors to repel these accusations. But his answer, characterized especially by professions of good intentions and by forgetfulness of various alleged acts impugning such intentions, does not impress us as indicative of any purpose upon his part to aggressively defend those principles above referred to if this case presents the necessity for so doing.

In fairness it is to be noted that no attack is made by appellants upon either the ability or good faith of the attorney who represents him, and who against their will has been selected for them by the court. We feel confident that none such could be made. But it is apparent that such attorney must necessarily be more or less subject to the will and control of his first client, the defendant trustee. At his behest, presumably, he has opposed the application of these appellants to be made parties. With the manifest distrust and lack of unity existing between the trustee and appellants it will be difficult, if not impossible, for one attorney, however conscientious and painstaking, to serve both with satisfaction.

Under such circumstances it seems to us that it not only is not

unjust to respondents, but it is the natural and practical solution, to allow that portion of the order which is not questioned by anybody to stand after we have cut out the obnoxious condition which was appealed from. This will allow these appellants in their own way and through their own attorney to present to the court their views upon the matters which they correctly or incorrectly conceive to be involved in this litigation. And we feel assured that in the end it cannot be otherwise than satisfactory in the highest degree to the defendant trustee to have this done, rather than that residents and taxpayers in the school district which he represents should feel distrustful of and dissatisfied with the results which might flow from his sole management of this litigation.

If we are correct in the foregoing views, it is unnecessary to consider or lay down as universal the principle that, when upon an appeal by one party an order has been modified by striking out some portion thereof, it should as so modified be affirmed and allowed to stand as against the party who has not appealed. It very well might be in some case that the provision reversed or cut out would be so connected with or would so modify the remainder of the order that it would be impossible or manifestly unjust to reverse in part and affirm in part. It is sufficient to say that in our judgment this case does not present either of these conditions. The relief sought by the original motion is completely covered by and comprehended within the portions of the order not appealed from. The other portion containing the condition is distinct and entire, and may be reversed without in any manner impairing the completeness of the main provision. The only question in this connection relates to the propriety and justice of so doing, and the application of the facts before us to the solution of that leads us to the conclusion already indicated.

Finally it may be said that the appearance of appellants by separate counsel will subject the plaintiff to double trouble and liability for costs in case of failure. It is to be again noted that she intrusted the opposition upon the original motion to defendant alone, making none herself. In our opinion she will be protected from any unreasonable burdens incident to the intervention of these new parties by the imposition of the condition that in the event of success they shall not have costs against her.

We, therefore, conclude that that portion of the order appealed

from should be reversed and the condition thereby imposed removed, and that the order as thus modified should be affirmed, with ten dollars costs and disbursements to appellants, upon condition that they execute a written stipulation not to tax costs against plaintiff. In case of their failure to make such stipulation the entire order is reversed, without costs.

All concurred, except McLENNAN, P. J., who dissented in an opinion in which STOVER, J., concurred.

McLENNAN, P. J. (dissenting):

The appellants made a motion to be made parties defendant in the action, under section 452 of the Code of Civil Procedure, upon the ground that they were the owners of real property within the school district of which the defendant Hendrick is sole trustee, which property would be affected in case judgment was recovered by the plaintiff, and the appellants allege in the moving papers that the plaintiff and the defendant trustee were acting collusively, and, therefore, that the trustee in the conduct of the action would not properly and in good faith protect the interests of the appellants.

The respondents opposed the motion and insisted that the court had no power to grant the relief asked for. We think their contention is correct, and that the court was without authority of law to grant the relief asked for. (*Christman* v. *Thatcher*, 48 Hun, 446, and cases cited.)

The court, however, granted the motion and directed that the appellants be made parties defendant in the action, but only upon condition that they employ a certain attorney named in the order to conduct the litigation for them, who, at the time, was the attorney for the defendant trustee.

While in no manner conceding the power or authority of the court to permit the appellants to be made parties to the action, with the condition imposed, the respondents were satisfied with the order as a whole, considered that its effect would be harmless, and, therefore, did not appeal therefrom. The appellants appeal from so much of the order as imposed the condition. We think it clear that the part of the order so appealed from was erroneous. The court has no power to compel a party to an action to employ any particular attorney to conduct such action for him. (*Jemmison* v. *Kennedy*, 55 Hun, 47; *Tenney* v. *Berger*, 93 N. Y. 524.)

The order appealed from consists of two provisions, both of which were made without authority of law, and any party aggrieved by either should have the opportunity to relieve himself therefrom.

With the two provisions standing together, the respondents did not consider that their rights were prejudiced, and for that reason did not appeal and did not attempt to have the first provision, although illegal, reversed, because, as we have seen, when taken in connection with the condition or the second provision of the order, it was not thought to be harmful. But it is suggested that the condition of the order having been appealed from must be reversed, because made without authority, but that the first provision, although also made without authority, should be permitted to stand, because no appeal has been taken therefrom and which would only become harmful or prejudicial to the rights of the original parties to the action by striking out the conditions imposed. It seems to me that such a disposition of the appeal is not fair or equitable, and is not justified by any recognized rules of practice. The order as made was erroneous in all its parts, but by reason of the condition imposed the respondents regarded it as harmless and were satisfied with it as a whole. With the condition stricken out it will not be satisfactory to them, and will become extremely prejudicial to their interests, and this result should not follow solely because the respondents failed to appeal from an order which, as a whole, was satisfactory to them. They were not bound to anticipate that this court would strike out of the order one provision which was illegal, but which rendered the other provision, which was equally illegal, harmless simply because the first provision was not appealed from, and in that manner, and solely for that reason, seriously prejudice their rights and interests. This should not be done unless it is to be regarded as the settled practice that an order which contains a condition, no matter how satisfactory it may be as a whole and with that condition in, must be appealed from by the party thus satisfied with it, in order to protect himself against the danger of having the condition which rendered the order unobjectionable stricken out by the appellate court, but leaving a single provision, although made without authority of law and which is prejudicial, in full force and effect.

It seems to me that, as each and every part of the order appealed

from is erroneous and made without authority of law, it should be reversed as a whole, with ten dollars costs and disbursements, and that the motion should be denied, with ten dollars costs.

STOVER, J., concurred.

Order reversed as to the provision appealed from requiring appellants as a condition of intervening to employ the attorney specified by the court, with ten dollars costs and disbursements to appellants, provided they stipulate in writing not to tax a separate bill of costs against the plaintiff in event of their success in the action. In case of failure to execute said stipulation the entire order is reversed, without costs to either party.

MATTHEW O'CONNOR, Appellant, v. EDWARD M. MOODY and GEORGE H. MOODY, Respondents.

Storage of fruit — where the contract is made with the warehousemen by one who guarantees the storage charges the warehousemen are liable to the owners for neglect in the care of the fruit.

One Ash, who represented a firm engaged in the produce and commission business, entered into a contract with the owners of a storage warehouse for the storage of fruit belonging to certain farmers, which fruit was in the custody of Ash or his firm to sell on commission. A list of the farmers whose fruit he was to handle was delivered by Ash to the owners of the warehouse.

At the time the contract was made Ash agreed that he would "guarantee" the payment of the storage charges upon all of the fruit.

One of the farmers, mentioned in the list furnished by Ash to the owners of the warehouse, delivered fruit at the warehouse for storage, taking a memorandum certifying that fact, and the owners of the warehouse marked the fruit with the farmer's name.

Held, that as it appeared that the owners of the warehouse knew that the farmer was the owner of the fruit, such farmer could, irrespective of any question as to the effect of the agreement with the commission firm, recover the value of the fruit from the owners of the warehouse in the event of its being destroyed through their negligence.

APPEAL by the plaintiff, Matthew O'Connor, from a judgment of the County Court of Niagara county in favor of the defendants, entered in the office of the clerk of the county of Niagara on the 31st day of August, 1903, upon the dismissal of the complaint by

direction of the court after a trial at a Trial Term of said court, and also from an order, bearing date the 2d day of June, 1903, and entered in said clerk's office, denying the plaintiff's motion for a new trial made upon the minutes.

D. E. Brong, for the appellant.

Alvah K. Potter, for the respondents.

SPRING, J.:

The defendants own and operate a cold storage warehouse in Lockport, N. Y., and the plaintiff, a fruit grower, in October, 1902, delivered to the warehouse a quantity of apples and pears in barrels to be stored for a fixed compensation. The plaintiff claims that the fruit was destroyed through the negligence of the defendants and the action is to recover its value.

The agreement for the storage of the fruit was made with one Ash, who represented Crutchfield & Woolfolk, a Pennsylvania copartnership, engaged in the produce and commission business. Ash agreed with the defendants to pay them for the storage of the fruit in their warehouse thirty-five cents per barrel for the season and a specified rate by the month if the fruit was kept for less than the entire season.

The defendants knew that this fruit belonged to the farmers and was in the custody of Ash or his firm to sell on commission. In fact a list of the farmers whose fruit he was to handle was given by Ash to the defendants, which included the plaintiff and that of his son, whose claim has been assigned to the plaintiff. The defendants contend that they are not liable to the plaintiff, alleging that there was no privity of contract between them, and that they dealt with Crutchfield & Woolfolk and not with the plaintiff.

On the trial the court, after hearing the proofs of the plaintiff showing the arrangement by which the merchandise was delivered to the defendants, intimated that there was no liability. The plaintiff thereupon offered to establish the facts out of which the negligence arose, but the evidence was excluded and the plaintiff nonsuited. In reviewing the appeal from the judgment of nonsuit the plaintiff is entitled to the assumption that he might have proved all the facts contained in his offer.

Ash testified that there was some little haggling over the price to be paid to the defendants for storing the fruit, and finally he said: "Well, I will guarantee this part. I will guarantee all storage for my own fruit and every one else as fast as it is taken out of storage; that the proceeds will be properly paid and each man will have to take his own rubbish away. * * * I told him that I would guarantee their storage charges. He asked me when I told him or asked him for storage for my own and others if I intended to guarantee all storage charges for them all. He asked me if I would guarantee all storage charges and I told him I would. * * *"

This proof indicates that the firm represented by Ash was not primarily liable for the payment of the storage charges; that their liability was that of a guarantor; that the owner of the property was the real paymaster.

Irrespective of the question of the effect of the agreement with the commission firm, the defendants may be charged. The evidence quoted tends to show that the defendants knew the fruit belonged to the farmers delivering it. In addition to that, the plaintiff delivered his fruit and took a memorandum certifying that fact. The fruit was marked by the defendants, "showing the name of the party and the number and the character of the apples." The fruit, therefore, belonged to the plaintiff and the defendants knew it. He certainly could maintain an action for its recovery if converted. (*Green* v. *Clarke*, 12 N. Y. 343; *Baird* v. *Daly*, 57 id. 236.)

The true owner is the one seeking to recover his property or its value. The defendants were bailees for hire of the plaintiff's property either through him or his agents. By the fault or misconduct of these bailees it has been destroyed. The intermediary did not have the title, as the defendants knew.

Barring any question of a lien upon the goods, which is not up here, there is no reason why the plaintiff cannot recover for the value of whatever interest he may have had in them.

The judgment and order should be reversed and a new trial ordered, with costs to the appellant to abide the event.

All concurred.

Judgment and order reversed and new trial ordered, with costs to the appellant to abide event.

THE JEFFERSON COUNTY NATIONAL BANK, Appellant, v. ADELAIDE W. DEWEY, as Executrix, etc., of ADDICE E. DEWEY, Deceased, and ALBERT E. NETTLETON, Respondents, Impleaded with Others.

Payment — the application on a note of money received under a judgment in a creditor's action, the balance being paid by, and the note surrendered to, the indorsers — liability of the indorsers where the judgment in the creditor's action is reversed on appeal and restitution is ordered.

The Eureka Chemical Company executed its promissory note for $2,800 payable to the order of six specified persons. The note was indorsed by all of the payees and transferred to the Jefferson County National Bank. The note not being paid at maturity the bank brought an action against the chemical company thereon, and procured a judgment.

Subsequently the bank, without any request on the part of the indorsers, brought a creditor's action against one Townley and others to set aside, on the ground that they were fraudulent as to it, certain judgments which were apparently liens upon the property of the chemical company. The bank recovered judgment in said action at the Trial Term, and the property of the chemical company was sold thereunder and the proceeds of the sale were indorsed upon the note.

Thereafter the bank demanded of the indorsers on the note the payment of the balance due thereon, which demand was acceded to and the note surrendered by the bank. The payments thus made by the indorsers were made with the intent and purpose of discharging the debt and the note was voluntarily surrendered by the bank with full knowledge of the facts and without any fraud or mistake.

Subsequently the Appellate Division affirmed the judgment recovered by the bank in the Townley action, but thereafter it was reversed by the Court of Appeals and an order of restitution was entered, pursuant to which the bank repaid to the sheriff the sum received from the sale of the property of the chemical company. A retrial of the Townley action resulted in the complaint being dismissed, with costs.

The bank subsequently brought an action against the indorsers on the note to recover the sum repaid to the sheriff and the costs paid by the bank in the Townley action.

Held, that the bank was not entitled to recover.

WILLIAMS, J., dissented.

APPEAL by the plaintiff, The Jefferson County National Bank, from a judgment of the Supreme Court in favor of the defendants, Adelaide W. Dewey, as executrix, etc., of Addice E. Dewey, deceased, and another, entered in the office of the clerk of the county of Jefferson on the 8th day of April, 1903, upon the decision

of the court, rendered after a trial before the court without a jury at the Jefferson Trial Term, dismissing the plaintiff's complaint as to said defendants.

The action was brought to recover from certain indorsers of a note of the Eureka Chemical Company an amount unpaid thereon and the costs of a creditor's action brought to collect the note out of certain property of the maker.

John Lansing, for the appellant.

George B. Warner and *John N. Carlisle*, for the respondents.

STOVER, J.:

On the 25th day of December, 1891, the Eureka Chemical Company, a corporation doing business at Syracuse, N. Y., made and delivered its promissory note for $2,800, payable in three months at plaintiff's banking office. Said note was payable to the order of A. E. Dewey, the testator of the defendant Adelaide W. Dewey and the other defendants, and was indorsed by each of them. Plaintiff discounted said note at its date, and, not being paid at maturity, it was protested for non-payment, and notice duly given to the indorsers.

Plaintiff on September 2, 1892, recovered judgment on said note against the maker for the full amount thereof ($2,934.96).

Plaintiff subsequently brought an action based upon this judgment against Margaret A. Townley and others to set aside certain judgments which were apparent liens upon the property of the Eureka Chemical Company, but which were claimed to be fraudulent as to plaintiff. Plaintiff recovered a judgment in said action and the property of the Eureka Chemical Company was sold thereunder, and on March 21, 1895, the proceeds of such sale, amounting to $2,576.41, were paid to plaintiff, and that amount, less the legal fees for collection, was indorsed upon the note in question. In December, 1895, plaintiff demanded of the indorsers the payment of the balance due on said note, and on December 18, 1895, A. E. Dewey, Nettleton and Phillips each paid about $127, being one-sixth of the amount due. About March 1, 1896, the plaintiff demanded of the defendants Nettleton and A. E. Dewey the sum of $430.70 as the balance due upon said note, and on the 7th day

of March, 1896, the defendants Albert E. Nettleton and A. E. Dewey paid the balance of $430.70 due on said note and the plaintiff indorsed said sum upon said note and then surrendered said note to said A. E. Dewey who continued in possession thereof from said date and produced said note upon the trial of this action.

The referee finds that such payment and delivery were made with the intent and purpose of discharging the debt, and that said note was voluntarily surrendered with full knowledge of the facts and without any fraud or mistake existing after the payment of March, 1895. An appeal was taken by Margaret A. Townley in the creditor's action, and the judgment and decree under which the money paid over on March 21, 1895, was collected was reversed. On a new trial of the creditor's action the complaint was dismissed. On August 12, 1899, an order was made directing the plaintiff to repay said sum to the sheriff, and such repayment was made by plaintiff. Plaintiff subsequently demanded said sum and costs incurred from the defendants Nettleton and A. E. Dewey, which demand was refused.

It was conceded on the trial that as to the defendants other than Nettleton and Dewey, except Phillips, the claim upon said note was barred by the Statute of Limitations, and that said Phillips was insolvent. It is contended by appellant that the creditor's action was brought at the request of defendants Nettleton and A. E. Dewey.

The trial court has found to the contrary upon evidence which justified such finding. There is no direct evidence of an agreement to bring the suit, and one of the respondents denies that there was any agreement. So, however strong the inference from circumstances of an agreement, the court's finding cannot be disregarded on appeal.

There was no mistake of fact. The payment of the balance claimed to be due was made with a full understanding of the circumstances. When the payment was made, the indorser's right to subrogation, except for the amount then paid, was gone. The holder had no claim against the indorser, and if the entire amount of the note had been paid by the indorsers, they would have had no recourse against the maker beyond the balance due after crediting the amount realized upon the judgments against the maker. It

was not possible, at the time the balance was paid by the indorsers, for plaintiff to put them (the indorsers) in a position to enforce the notes for their full amount against the makers.

The rule applied in *Larkin* v. *Hardenbrook* (90 N. Y. 333) should be applied here. The court having found upon sufficient evidence that the note was surrendered at the time of the payment of the balance then due, "with the intent and purpose of discharging the debt and the plaintiff accepted said sum and indorsed the same upon the said note, and thereupon surrendered said note to the said Addice E. Dewey," one of the indorsers, and "that said note was voluntarily surrendered by the plaintiff at said time, with full knowledge of all the facts, and without any fraud or mistake existing at that time," a complete satisfaction was shown, and effect should be given to it.

Plaintiff might have reserved its right, but it did not. It is quite evident that it relied upon its judgment, and when it surrendered the note it intended to discharge the liability of the indorsers. In fact, it could not refuse to do otherwise. It had the avails of the judgment credited to the note, and the indorsers were entitled to its surrender on payment of the balance. If plaintiff had by any act of its own placed itself in a position where it was not able to respond to the indorsers upon a demand of subrogation on payment as indemnity for the full amount paid, it alone was responsible, and, so far as it had lost the ability to answer to the demand, it had relieved the indorsers.

The evidence warranted the findings of the trial judge, and the law was correctly applied. The judgment should be affirmed.

All concurred, except WILLIAMS, J., who dissented in an opinion; HISCOCK, J., not sitting.

WILLIAMS, J. (dissenting):

The judgment should be reversed and a new trial granted, with costs to appellant to abide event.

The action was brought to recover the amount unpaid upon a note and costs incurred in an effort to collect the same from the maker, these defendants being indorsers upon the note.

Most of the facts are undisputed. The Eureka Chemical Com-

pany, a corporation doing business at Syracuse, N. Y., December 25, 1891, made its note for $2,800 payable three months after date to the order of Dewey, Nettleton, Farmer, Phillips, and two Copleys. All the payees indorsed the note and it was transferred to this plaintiff, the Jefferson County National Bank. When the note matured it was not paid and was protested and the indorsers had notice thereof. An action was thereafter brought upon the note against the maker, the chemical company alone, and a judgment recovered September 2, 1892, for $2,934.96. An action based upon this judgment was then brought to set aside certain judgments recovered by Mrs. Townley against the chemical company, and which had become liens upon its property prior to this plaintiff's judgment. This plaintiff had judgment at the Special Term setting aside the Townley judgments and under the same the sheriff paid to this plaintiff March 21, 1895, the sum of $2,576.41, being the proceeds of property of the chemical company which he had sold. This amount, less what was paid for collecting check, $2.41, leaving $2,574, was received and applied upon the note in question. Thereafter the balance of the note was paid by the indorsers, viz.: December 18, 1895, by Dewey, $126.88, and by Nettleton, $126.88; December 24, 1895, by Phillips, $127, and March 7, 1898, by Dewey and Nettleton, $430.70. The note was thereupon surrendered by the plaintiff to Dewey and Nettleton. After the payment of the money by the sheriff to this plaintiff under the judgment in the Townley action, that judgment was affirmed on defendant's appeal by the General Term, by judgment entered on January 13, 1896 (*Jefferson County Nat. Bank* v. *Townley*, 92 Hun, 172), but on appeal by defendants to the Court of Appeals the judgment was, June 13, 1899, reversed and a new trial ordered (159 N. Y. 490); August 12, 1899, the court made an order of restitution in the Townley action, directing this plaintiff to pay back to the sheriff the money received from him by depositing the same in the Trust and Deposit Company of Onondaga County to his credit, and the plaintiff complied with that order and paid to the trust company August 31, 1899, $2,576.41 and also paid $10 costs of the application for such order. November 14, 1899, the Townley action was again tried and judgment rendered dismissing the complaint with $635.51 costs, and directing the money in the trust com-

pany to be paid by the sheriff to Mrs. Townley, and it was so paid. This plaintiff paid the costs awarded November 22, 1899.

After this plaintiff had been compelled to pay back the money received from the sheriff and allowed as a payment on the note, it notified Dewey and Nettleton and all the other indorsers on the note of the situation, and asked them, in substance, to make this plaintiff whole as to the amount unpaid upon the note and as to the costs of the Townley suit. This request not being complied with, this action was brought December 7, 1899, to recover the sum of $2,576.41 repaid to the sheriff, and the costs paid by this plaintiff in the Townley action, $635.51. In form the action was against all the indorsers, but Dewey and Nettleton only were served. The others were considered as irresponsible. The two defendants served answered, and the trial was had before Justice HISCOCK and a jury in January, 1901, while Mr. Dewey was still living. At the close of the evidence, with the consent of the parties, the jury were discharged and the case was to be submitted to and decided by the court. Mr. Dewey died March 28, 1902. Justice HISCOCK went into the Appellate Division, and in October, 1902, by consent of parties, the case was submitted to Justice ANDREWS, and his decision was rendered and judgment entered thereon in April, 1903, dismissing plaintiff's complaint as to both claims for amount unpaid on note, and costs in the Townley case. This result followed some conclusions found by the court, which are questioned upon this appeal, viz.:

1. "There being no proof in the case to show that the defendants Addice E. Dewey or Albert E. Nettleton ever requested the plaintiff to commence the judgment creditors' action against Margaret A. Townley, there is no liability on the part of the defendants Nettleton and Dewey to pay the costs incurred by the plaintiff upon the trial of the said action."

2. "The note in question having been paid after maturity, and voluntarily surrendered by the plaintiff to the said Nettleton and Dewey with the intent and purpose of discharging the debt, and without any fraud or mistake of fact on the part of the plaintiff, such voluntary surrender operated as a release and discharge from any liability against said defendants Albert E. Nettleton and the said Addice E. Dewey."

These findings are in part of facts and in part of law, based upon the findings of fact. The findings of law were correct if the facts were properly found. The facts were, in substance:

First. That there was no proof that the Townley action was brought at the request of the two indorsers.

Second. That the surrender of the note was not made under any mistake of fact.

First. Upon the first question let us look at the facts and circumstances surrounding the commencement and prosecution of the Townley action. Mr. Camp, the president of the bank, plaintiff, who had charge of the business, was dead at the time of the trial. He died February 1, 1897. That was after the affirmance of the Townley judgment at General Term, but before the reversal in the Court of Appeals. It was after the payments upon the note in 1895, and before the final payment and surrender of the note in 1898. The Townley action clearly was brought and prosecuted for the benefit of the indorsers upon the note. The bank had no reason for bringing the action. It could have required Dewey and Nettleton to pay the note, and no suit against them would have been necessary. They were concededly liable for the amount of the note, and were perfectly responsible. If that course had been adopted the bank would have received its money, and the burden would have fallen upon the indorsers of bringing and prosecuting the Townley action. After the Townley judgments had been recovered motions were made to set them aside. Mr. Dewey was president of the chemical company, Judge Sawyer was one of the directors, the only lawyer on the board, and the legal adviser of the company. Judge Sawyer made these motions. The defaults were opened and cases referred and tried, but judgments were again recovered and executions issued thereon and levied upon the company's property. Then Judge Sawyer and Mr. Dewey had a consultation as to the way to get rid of these judgments. Judge Sawyer advised that an action be brought by some creditor who had a judgment against the company. After some conversation as to how the matter could be done, and in behalf of what creditor, it was concluded that the better way would be to bring an action in behalf of the bank, this plaintiff, upon this note on which some of the directors were indorsers, and procure a judg-

ment against the company, and then with that judgment set aside the Townley judgments as in fraud of creditors. Judge Sawyer told Mr. Dewey that he had better see Mr. Camp, president of the bank, explain the matter fully to him and see if he could not obtain his consent to bring the action in that way. Mr. Dewey then left Judge Sawyer. Within one, two or three days after this Mr. Camp brought the note to Judge Sawyer in his office and left it with him. Judge Sawyer had the note put in judgment against the company alone, his managing clerk, Mr. Steele, acting as attorney for the bank, and the summons being served upon Mr. Dewey, as president of the company. Upon the recovery of that judgment a motion was made based thereon to set aside the Townley judgments as fraudulent against creditors of the company. The court held that relief could only be afforded in an action in equity and proceedings on the judgments and executions were stayed to enable the action to be brought. The action was then brought and a temporary injunction was issued and served. Upon motion the injunction was continued during the pendency of the action. Judge Sawyer communicated with Mr. Camp before the equity action was commenced and Mr. Camp verified the complaint. Judge Sawyer acted as attorney for the plaintiff. Mr. Dewey and one of the Copleys, indorsers on the note, were the sureties upon the bond for the injunction. Mr. Dewey aided Judge Sawyer in the preparation and trial of the suit. The bank paid no attention to it. Judge Sawyer had charge of the case until after the reversal in the Court of Appeals and during the proceedings for restitution. He was not the general counsel of the bank, and finally turned the matter over to Mr. Lansing, who was general counsel for the bank. These circumstances were sworn to by Judge Sawyer upon the trial of this action, and, if his evidence was believed, it not only justified the inference that the bank permitted the note to be put in judgment and the equity suit to be commenced and prosecuted at the request and for the benefit of the indorsers upon the note, but such inference would be irresistible. The only answer to it is that Mr. Dewey, as a witness on the trial, denied the interviews sworn to by Judge Sawyer, and denied that he had any interview with Mr. Camp or any officer of the bank with reference to the matter. He was, however, a party to the action, his credibility was for the court to

determine, and the court might find he *had* the interview with Mr. Camp advised by Judge Sawyer, inferring that fact from the circumstances, even though Mr. Dewey denied it upon the stand. Mr. Camp was dead and could not speak upon the subject, but how came he to bring Judge Sawyer the note and leave it with him without any directions whatever unless someone had talked the matter over with him beforehand? Judge Sawyer testified he did not make any arrangement with him. Someone certainly did, otherwise why should he, as president of the bank, which had no interest in the Townley litigation, but had the means of securing payment of the note by merely demanding it of Dewey and Nettleton, why should he, I say, set this whole Townley litigation in motion? The finding that there was no evidence in the case that Dewey and Nettleton requested the bank to commence this litigation cannot and should not be sustained. The only reasonable conclusion that could be drawn from the evidence was that Judge Sawyer and Mr. Dewey acted for the indorsers on the note in commencing and carrying on the litigation. These indorsers were the only persons to be benefited by setting aside the Townley judgments. Mrs. Townley had valid debts against the chemical company, but it was claimed that the judgments and liens procured thereon were in fraud of the rights of the creditors represented by this note. When the judgments were set aside the company's property would be released from the liens of the judgments and would be applied in payment of this note to the relief of the indorsers. There was no direct proof that Mr. Nettleton, any more than Mr. Dewey, requested this Townley litigation to be begun and continued, but he knew it was going on and that it was for his benefit as well as Mr. Dewey's, and the fair inference was that it was so begun and carried on with his assent and by his request through Mr. Dewey, if not personally. Under all the circumstances there *was* evidence that the Townley litigation was undertaken and carried on at the request of these two defendants, and this fact should have been found by the trial court.

Second. The court erroneously found that the note was not surrendered under any mistake of fact. The facts with reference to the surrender were not in dispute. All the parties understood that the money paid by the sheriff to the bank under the judgment in the Townley action could be retained and would not have to be paid

back, and that it was an absolute payment of so much upon the note. The Townley litigation was being conducted by the defendants in the bank's name, and this money was, therefore, procured by the defendants to be paid over to the bank as an incident of that litigation. No one had the slightest apprehension of a reversal of the judgment directing that money to be paid to the bank when the note was surrendered. The reversal was close, four judges voting for the reversal and three for affirmance (*Jefferson County Nat. Bank* v. *Townley*, 159 N. Y. 490). The effect of this reversal was to make the judgment as if it had never been, and to render the payment by the sheriff to the bank unauthorized, and to require the money to be repaid. It was not, in fact, a payment to the bank of any money which it could apply on the note, and the surrender was, therefore, made under the mistake shared in by all the parties that there had been a payment made upon the note of the amount received from the sheriff under the Townley judgment. In fact, there had been no such payment. Upon this finding of the court we have this condition of things: The defendants, indorsers, were conducting the Townley litigation in the name of the bank to secure payment of this note. In the course of the litigation they procured this money to be paid by the sheriff to the bank to apply on the note. All parties supposed this to be an absolute payment of money which the bank could keep, and upon this understanding the bank and the defendants straightened up the note and the defendants paid the balance thereof, and it was surrendered to them as a fully paid note. In the further progress of the litigation, however, this payment by the sheriff turned out to be without authority, and the court, in this same litigation being conducted by the defendants, compelled the bank to pay back the money. Still the defendants, by the surrender of the note, were relieved from the obligation to replace the money which had been regarded as a payment on the note, but which turned out not to have been a payment at all. The note has never been fully paid. The indorsers are still liable for this amount, supposed to have been paid, which, however, never has been paid. The result in this case, as it has been decided by the trial court, is unjust and unfair, and it should not be permitted to stand. The bank, by its president, kindly consented to postpone payment of this note by the indorsers, and to allow this Townley

litigation to be commenced and carried on in its name for the purpose of receiving thereby the whole or a part of moneys owing upon the note from the chemical company's property. This purpose was understood to have been accomplished and the indorsers to have been benefited to the extent of $2,576.41, but finally the effort failed; this money was lost and a bill of costs of $635.51 was left for the bank to pay. The court ought not to permit the defendants to leave this burden upon the bank, as a reward for its forbearance and kindness in the premises. The two findings of fact considered were erroneously made. Facts should have been found from which the legal conclusion would follow that plaintiff was entitled to recover both the balance due on the note and the costs of the Townley litigation. All the findings were duly excepted to. The conversation between plaintiff's counsel and Justice HISCOCK on the trial do not render the exceptions ineffectual.

I conclude that the judgment should be reversed and a new trial granted, with costs to the appellant to abide event.

Judgment and order affirmed, with costs.

JOHN T. LEWIS, Respondent, v. ELI M. UPTON and Others, Appellants, Impleaded with MARY CRENNELL.

Stare decisis — *a decision of the Appellate Division on a first appeal, that a question of fact was presented for the jury, adhered to on a second appeal, where the facts were substantially the same on each trial.*

The plaintiff in an action brought to compel the determination of a claim to real property asserted a record title to the property, and also a title thereto by adverse possession. Upon the first trial of the action the court submitted both these questions to the jury, and the jury found a general verdict in favor of the plaintiff.

Upon an appeal the Appellate Division held that there was no evidence to support the plaintiff's claim of a record title, but that the question whether the plaintiff had acquired title by adverse possession was one of fact for the jury. Being unable to say upon which claim the jury based its verdict, the Appellate Division reversed the judgment and directed a new trial upon the question of adverse possession alone.

The evidence given upon the new trial with respect to the issue of adverse possession was substantially the same as that given on the former trial. The issue was submitted to the jury and the plaintiff again obtained a verdict.

Upon a second appeal to the Appellate Division it was claimed that there was no question for the jury on this issue, and that the trial court should have held as matter of law that the plaintiff acquired no title by adverse possession.

***Held*, that the Appellate Division, having once decided that the issue of adverse possession was properly submitted to the jury, should adhere to that decision and leave the correctness thereof to be considered by the Court of Appeals, if the defendants desired to appeal to that court.**

McLENNAN, P. J., and STOVER, J., dissented.

APPEAL by the defendants, Eli M. Upton and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Monroe on the 29th day of December, 1902, upon the decision of the court rendered after a trial at the Monroe Trial Term, made after the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 29th day of December, 1902, denying the said defendants' motion for a new trial made upon the minutes.

Charles J. Bissell and *Erwin E. Shutt*, for the appellants.

John Van Voorhis, for the respondent.

WILLIAMS, J.:

The judgment and order should be affirmed, with costs.

The action was brought under section 1638 of the Code of Civil Procedure to compel the determination of a claim to real property. The plaintiff claimed that he had a record title to the real property and that he had also acquired title thereto by adverse possession.

Upon a former trial of the action both these questions were submitted to the jury under the instruction of the court that the plaintiff could recover if it was found that he had either a record title or a title acquired by adverse possession. The jury rendered a general verdict for the plaintiff. Upon appeal to this court it was held that there was no evidence to support the verdict if it was based upon the claim of a record title, because the deed under which he claimed did not cover the property in question. The court also held that the question of title acquired by adverse possession was one of fact for the jury. (52 App. Div. 617.)

Inasmuch as the court could not say upon which claim the jury based its verdict, it was compelled to reverse the judgment and

direct a new trial upon the question of adverse possession alone. Thereupon the case was again tried, and the decision of this court followed. The question of a record title was eliminated from the case, and the question of title by adverse possession was submitted to the jury. The plaintiff again had a verdict. Upon an appeal to this court it is now claimed that there was no question for the jury upon this issue, and that the trial court should have held as matter of law that the plaintiff acquired no title to the property by adverse possession. This court having once passed upon that question, on practically the same class of evidence, we should adhere to our former decision and leave the question to be considered by the Court of Appeals should the defendants desire to take the case to that court. If this court had held upon the former appeal that there was no question for the jury as to adverse possession, the case could then have gone directly to the Court of Appeals; but, under the decision then made, a new trial became necessary and it was had at considerable expense to the parties, and the result of such trial should not now be nullified by reversing our former decision. Moreover, upon the merits, we are of the opinion that the various questions involved in the claim of title by adverse possession, including the occupation and cultivation of the property and the protecting of the same by substantial inclosure, were properly submitted to the jury, and the evidence was sufficient to support the verdict rendered.

No errors in the admission or rejection of evidence, or in the charge of the court, were committed, calling for a reversal of the judgment.

The judgment and order should, therefore, be affirmed, with costs.

All concurred, except McLENNAN, P. J., dissenting in an opinion in which STOVER, J., concurred.

McLENNAN, P. J. (dissenting):

The action was commenced on the 19th day of March, 1895, under section 1638 of the Code of Civil Procedure, to compel the determination of the claim of title made by the defendants to the premises described in the complaint. The answer denied plaintiff's title and possession, and alleged title and possession in the defend-

ants. Plaintiff replied, averring that defendants' title is void under the Champerty Act, and setting up adverse possession as against the defendants.

As appears by the judgment appealed from, three specific questions were submitted to the jury, as follows:

First. Was the plaintiff, or were those whose estate he has, in possession of the real proprty in lot 43, in dispute in this action, for one year before March 19, 1895, the date of the commencement of this action, claiming said premises in fee?

Second. At the time of the commencement of this action, had the plaintiff acquired title in fee to the premises in dispute by adverse possession thereof for twenty years or upwards?

Third. Are the deeds from the heirs of Oliver Phelps, under which the defendants, except the defendant Hubbell, claim title to the premises in dispute, champertous and void for that reason?

The jury answered each of said questions in the affirmative, and thereupon a judgment was entered in favor of the plaintiff, "that the defendants, and every person claiming under them by title accruing after the filing of the notice of the pendency of this action, be and are hereby forever barred from all claim to any estate, claim or interest, of any kind or nature, in the lands described in the complaint, or any lien thereon or easement therein." The judgment then contained a description of the lands, which is precisely the same as contained in the complaint, and further awarded to the plaintiff the sum of $727.38 for his costs of the action. From such judgment and from the order denying defendants' motion for a new trial this appeal is taken.

The tract of land which is the subject of this controversy contains twenty-six and four-tenths acres; it is substantially 400 feet wide, and extends along the shore of Lake Ontario for a distance of nearly half a mile. While somewhat irregular in shape, it may, for all practical purposes, be described as being bounded on the north by Lake Ontario, on the east by the old outlet of Buck pond, so called, on the south by Buck pond and the John Tennison farm, so called, and on the west, also, by said farm. The tract is a part of township No. 2, short range of townships in the town of Greece, Monroe county, N. Y. The township is bounded on the east by the Genesee river, extends westerly for its entire length

along the shore of Lake Ontario, and contains over 20,000 acres, besides five ponds each covering a few hundred acres.

In 1803 this township was owned by sixteen tenants in common, among others Sir William Poultney and Oliver Phelps. In that year one William Shepard made a map and survey for the owners of said township, dividing it into lots, two of which were numbered 45 and 43 respectively, each containing about 300 acres, exclusive of the area covered by Long pond, which was located in lot 45, and Buck pond, located in lot 43. These two lots, which are the only ones directly involved in this controversy, abut upon the lake and adjoin each other, lot 43 lying immediately easterly of lot 45.

By deed dated October 4, 1804, to which the Shepard map and survey were annexed and made a part thereof, the owners partitioned the township among themselves. Lot 45 was allotted to Sir William Poultney, and lot 43, together with lot 44 and other lots lying still further to the east, all being of substantially the same size, was allotted to Oliver Phelps.

In 1817 one Valentine Brouthers made a map and survey of lot 45, dividing it into separate parcels and making a description of each. By deed dated January 7, 1831, which was duly recorded on the 22d day of September, 1832, the Poultney estate conveyed to one John Tennison one of said parcels, being a farm lying in the easterly part of lot 45, which was described by metes and bounds, "containing one hundred and twenty-three acres and ninety one-hundredths of an acre, as surveyed by Valentine Brothers, be the same more or less." On the 1st day of April, 1847, John Tennison, by an instrument in writing, leased the farm to Delos Lewis, who is the father of the plaintiff and was the husband of Ann Lewis, deceased, a daughter of John Tennison, now deceased. Delos Lewis continued to occupy the premises from that time as such tenant, residing thereon with his wife until the death of John Tennison, which occurred about the year 1860. By deed dated January 19, 1861, which was duly recorded January 21, 1861, in which the premises are described precisely the same as in the deed from the Poultney estate to John Tennison, the other heirs of John Tennison, deceased, conveyed the Tennison farm to Ann Lewis, plaintiff's mother and the wife of Delos Lewis. Under such deed she with her husband

occupied said farm until the year 1881, when she, Ann Lewis, died intestate, and her husband, Delos Lewis, became tenant by the curtesy, with remainder to the plaintiff John T. Lewis, her only heir and next of kin. By quitclaim deed dated the 21st day of August, 1890, which was duly recorded, Delos Lewis conveyed his life estate in the farm or premises described in the Tennison deed to the plaintiff, John T. Lewis, and he thereupon became vested with the whole title to said premises, and continued to own and was in possession of the same at the time of the commencement of this action.

As we have seen, lot 43, which was immediately east of lot 45, and other lots lying east of lot 43 were allotted to Oliver Phelps by the partition deed referred to, which is the common source of title of all the parties to this action. It must be conceded that by the allotment under such partition deed, and by mesne conveyances, which it is unnecessary to enumerate, the defendants acquired the record title to the premises in dispute, if such premises were located in and were a part of lot 43.

The theory of the action when brought was that the plaintiff was the owner in fee of the lands in dispute, because they were part of lot 45, and covered by the deed from the Poultney estate to John Tennison, and by the mesne conveyances to the plaintiff. In the complaint, after alleging "that the plaintiff is the owner and seized in fee and is in possession of the following described real property," and then describing such property by metes and bounds, it is further alleged "that the plaintiff has been in possession of said real property for upwards of one year next preceding the commencement of this action as sole tenant, claiming it in fee, and that he holds the same as heir at law of Ann Lewis, deceased, and as purchaser by deed from Delos W. Lewis, and was in possession at the commencement of this action. That the defendants unjustly claim an estate or interest in the said property, claiming to have obtained the same by purchase from the heirs of Oliver Phelps, deceased, and claiming to be the owners in fee of said property." To such complaint the defendants made answer, denying that the plaintiff was the owner of or had been in the possession of the premises for a year previous to the commencement of the action, and alleged that they, the defendants, were the owners in fee simple of the premises in dispute. Thereupon the plaintiff served a reply,

in which he alleged, in substance and so far as it is important to note, that he had acquired title to the premises "under a claim of title exclusive of any other right, founding the same upon written instruments as being conveyances of the premises in question, and there has been a continued occupation and possession of the premises for more than twenty years under the same claim, before the commencement of this action." And it was further alleged, in effect, that such being the title, possession and claim of the plaintiff, the conveyances to the defendant were champertous and, therefore, void.

Upon the pleadings as thus framed, and upon the opening of plaintiff's counsel, the defendants made a motion at the commencement of the trial to compel the plaintiff "to elect upon which title he will stand, whether as heir at law of Ann Lewis, as alleged in complaint, or as purchaser by deed from Delos W. Lewis of Shelly title, on the ground that the two titles are absolutely inconsistent and hostile to each other." The motion was denied upon the ground, as we must assume, that by the pleadings or opening it did not appear that the written instruments referred to in the reply or opening were any other than the deed from the Poultney estate to John Tennison, and the mesne conveyances of the Tennison farm to the plaintiff. Of course, it would not do for a plaintiff to claim in the same action that he had acquired title to premises by adverse possession, under a claim of title founded upon a certain written instrument, and at the same time assert that he had acquired such title by virtue of a claim of title founded upon another and different instrument, in no manner connected with the first. The provision of section 369 of the Code is as follows: "Where the occupant or those under whom he claims entered into the possession of the premises under claim of title exclusive of any other right, founding the claim upon a written instrument as being a conveyance of the premises in question, * * * the premises so included are deemed to have been held adversely."

We think it cannot be held that a person may acquire title to premises by adverse possession, under a claim of title founded upon several instruments in writing, where such instruments are not in any manner connected or made by the same grantor. In other words, that a claim of title cannot be founded upon all of such

instruments, unless they all relate to or originate in the same source of title. Whatever ambiguity there may have been as to plaintiff's claim under the pleadings, it is made entirely apparent by the evidence given by him or in his behalf upon the trial.

The plaintiff, upon the trial, endeavored to prove: *First.* That he was the owner of the premises in question by virtue of the Tennison deed and the mesne conveyances to him. In other words, that the premises in question were a part of lot 45, and were included in and covered by such deed. *Second.* That although the disputed premises were not actually within lot 45, or included in the Tennison deed, he nevertheless became the owner by adverse possession, because he or his grantors were in possession, claiming to own the same under a claim of title founded upon the Tennison deed and the mesne conveyances to him, for a period of more than twenty years before the commencement of this action. *Third.* That even if the premises in question were not a part of lot 45, were not included in the Tennison deed, and he did not acquire title to the same by adverse possession, under a claim of title based upon the Tennison deed or the mesne conveyances to him, yet he became the owner of such premises by adverse possession under a claim of title founded upon a written instrument, under and by virtue of the Shelly and Nash deeds, so called, the history of which deeds is briefly as follows: As early as 1855, and for some years thereafter, one Jonathan Shelly, who was a fisherman, lived on the shore of Lake Ontario in a shanty which he had erected some distance east of the old outlet of Buck pond, and east of the premises in dispute. Some time prior to 1863 Shelly moved onto the disputed premises and erected another shanty in which he lived. In the year 1863 a man by the name of Eli Nash, who was also a fisherman and lived in another shanty on the shore of the lake, entered into an agreement with Shelly to purchase his, Shelly's, shanty, and agreed to pay therefor the sum of twenty-five dollars. Nash went to a lawyer to procure a conveyance of the shanty from Shelly to himself, and was advised by such lawyer to have Shelly execute a deed of the entire beach on Lake Ontario between the old outlet of Buck pond on the east and the Tennison premises on the west, in order to prevent Shelly from building another shanty upon such premises. A deed was prepared accordingly by the attorney, which

described the entire premises in dispute. It was executed by Shelly and delivered to Nash, and bears date June 5, 1863. In the same year Delos Lewis, who at the time was lessee of the Tennison farm, purchased the Shelly shanty from Nash for the sum of fifty dollars, and Nash executed to Delos Lewis a deed bearing date December 20, 1863, which contained the same description as the deed from Shelly to Nash, and which also purported to convey the entire premises in question. By deed dated March 13, 1891, Delos Lewis assumed to convey the same premises to his son John T. Lewis, the plaintiff in this action. Neither of said deeds was recorded until the 27th day of July, 1891, and not until after, as it is claimed, the plaintiff had acquired title to the premises therein described by adverse possession, under a claim of title founded upon such written instruments. The Shelly and Nash deeds had lain dormant for nearly thirty years, and, so far as the evidence discloses, no one except those immediately connected with the giving of such conveyances knew of their existence. There is not a particle of evidence to indicate that Delos Lewis ever said to any person during that time that he claimed to own the premises under or by virtue of the Nash deed, or that he ever intimated to any one that he had such an instrument. The premises were not assessed to him; he paid no taxes; there was absolutely nothing to indicate during all those years that he had title to the premises by virtue of a written instrument, or that he claimed to have.

At the time of the purchase by Delos Lewis from Nash, a man by the name of Lowden was occupying the Nash cottage, so called, with his consent, which cottage was located near the southwesterly corner of the premises in dispute, and after obtaining a deed from Nash Delos Lewis entered into a verbal agreement with Lowden by which he, Lowden, was given permission to occupy the Nash cottage and some portion of the premises for a yearly rental of ten dollars, to be paid in work. Under such agreement Lowden occupied the Nash cottage from 1863 until the year 1893 or 1894, when he was sent to the Monroe county poorhouse, and the cottage was pulled down by the defendant Beattie, who claimed to own it.

The evidence conclusively establishes that Nash knew when he purchased from Shelly that he, Shelly, had no right, title or interest in or to the property described in the deed executed by him; that

he was simply a "squatter" upon the premises; had erected his shanty thereon for his own purposes and to enable him more conveniently to carry on his occupation of fisherman. Also that Nash, who was likewise a fisherman and had erected for his convenience a cottage or shanty upon the premises, was also a "squatter" thereon. The evidence also conclusively establishes that when Delos Lewis purchased the Nash cottage and accepted the deed of the entire premises from him, he fully understood the nature of the possession of both Shelly and Nash, and knew that neither of them had any title to the premises which they assumed to convey.

Delos Lewis, who was called as a witness for the plaintiff, upon his direct examination testified: "There was a time when Eli Nash or a man by the name of Shelly constructed a cottage of some kind down on the beach — a little fish shanty; he was a hunter and fisher and made a living in that way; I knew at the time that Shelly conveyed whatever right he had there to Eli Nash; I didn't see the papers executed, but I heard of it." On cross-examination he stated: "I couldn't say how long I knew Shelly before he sold to Nash, but he was there a few years; Shelly's cottage or dugout was on the beach there; I don't know how long he was there; I can't tell anything about how Shelly first went there; he squatted down there and built up a shanty, and used to fish and hunt there. * * *. I suppose Shelly sold his shanty to Nash." And in answer to the question, "What title did you understand Shelly had to give Nash?" the witness answered, "I didn't understand he had any."

When the whole evidence bearing upon the question is considered we think it should be regarded as conclusively established that when Delos Lewis, the plaintiff's immediate grantor, took the deed from Nash describing the premises in question, he understood that Nash had no title to the same, and also that Shelly, Nash's grantor, was equally destitute of such title. In other words, he knew they were both "squatters" upon the premises, and only owned, if anything, the shanties which they had respectively constructed for their own use and convenience.

We have thus far indicated the character of plaintiff's record title, so far as it is based upon written instruments, namely, upon the Tennison deed and the mesne conveyances to the plaintiff there-

under, and the Shelly and Nash deeds and the mesne conveyances to the plaintiff following such deeds.

Upon a former appeal to this court in this action, the evidence being substantially the same as now before us, it was held as matter of law that the lands in dispute were not included in and did not form a part of lot 45; were not included in or covered by the Tennison deed, and that the plaintiff did not acquire title thereto by such conveyance or by adverse possession, under a claim of title founded thereon. (52 App. Div. 617.) Following such decision it was held by the learned trial justice upon this trial "that the Tennison deed describes land wholly within said lot forty-five. * * * That plaintiff has no record title under the Tennison deeds to the land in dispute. * * * The Tennison deed, inasmuch as it does not cover the premises in dispute, cannot be made the foundation in this action of a title by adverse possession."

Therefore, the plaintiff's right to recover under or by virtue of the Tennison deed, or the mesne conveyances to the plaintiff thereunder, is eliminated from our consideration, yet the evidence bearing upon that issue is still before us, and if sufficient to indicate that Delos Lewis, plaintiff's immediate grantor, claimed to own the premises in dispute under a claim of title founded upon such deed, rather than upon the Nash deed, it may become important to determine whether or not he can sucessfully make a like claim of ownership and found such claim of title upon the Nash deed. But passing that question for the present.

Does the evidence justify the finding of the jury that the plaintiff acquired title to the premises in dispute by adverse possession? The acquisition of such title is regulated, so far as important to note, by sections 369 to 372, both inclusive, of the Code of Civil Procedure. Such title can only be acquired in one of three ways:

First. "Where the occupant, or those under whom he claims, entered into the possession of the premises, under claim of title, exclusive of any other right, founding the claim upon a written instrument, as being a conveyance of the premises in question, * * * and there has been a continued occupation and possession of the premises included in the instrument, * * * or of some part thereof, for twenty years, under the same claim, the premises so included are deemed to have been held adversely. * * *" (§ 369.)

Section 370 defines what constitutes adverse possession by a person claiming a title founded upon a written instrument as follows:

"1. Where it has been usually cultivated or improved.

"2. Where it has been protected by a substantial inclosure.

"3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber, either for the purposes of husbandry or for the ordinary use of the occupant.

"Where a known farm or a single lot has been partly improved, the portion of the farm or lot that has been left not cleared, or not inclosed, according to the usual course and custom of the adjoining country, is deemed to have been occupied for the same length of time as the part improved and cultivated."

Section 371 provides:

"Where there has been an actual continued occupation of premises, under a claim of title, exclusive of any other right, but not founded upon a written instrument, or a judgment or decree, the premises so actually occupied, and no others, are deemed to have been held adversely."

Section 372 defines what constitutes adverse possession under sec tion 371, and provides:

"For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases, and no others:

"1. Where it has been protected by a substantial inclosure.

"2. Where it has been usually cultivated or improved."

It will be seen that where a person enters upon premises, claiming to own the same, and protects them by a substantial inclosure, or where they have been usually cultivated or improved by him continuously for a period of twenty years, it is entirely immaterial whether he has a conveyance of such premises, or whether or not he claimed title, founding the same upon a written instrument. In either case the continued occupation, the substantial inclosure, the fact that the premises have been "usually cultivated or improved," if continued for twenty years under a claim of ownership, ripens into title. We are, therefore, to determine whether or not the plaintiff acquired title to the premises under either of those provisions of the

statute: *First*, were the premises in dispute protected by a substantial inclosure? As we have seen, the northerly boundary of the premises, extending for a distance of nearly half a mile, was the shore of Lake Ontario; irregular in shape, low and sandy, and some portions of it marshy. Buck pond formed a portion of the southerly boundary, the shore of which was also irregular in shape and marshy. The balance of the premises upon the south, and also upon the west, was bounded by the Tennison farm, and the evidence indicates that the line of such farm was marked by a substantial fence for a period of more than twenty years before the commencement of this action. The easterly boundary of the premises in question was what is called the old outlet of Buck pond, which extended from Buck pond northerly to the lake. The real outlet had been changed to some distance east many years before. The evidence, so far as it relates to the question whether or not the premises in dispute were protected by a substantial inclosure, has reference to what fence there was, during the alleged occupancy of the plaintiff, along this old outlet and upon the easterly boundary of the premises.

In order to constitute adverse possession under the provision of the statute which requires that the premises claimed should be protected by a "substantial inclosure," "there must be a real and substantial inclosure and actual occupancy a *possessio pedis*, which is definite, positive and notorious, to constitute an adverse possession, when that is the only defense and is to countervail a legal title." (*Jackson* v. *Schoonmaker*, 2 Johns. 230.) This definition of adverse possession by a substantial inclosure was quoted with approval by *Pope* v. *Hanmer* (74 N. Y. 240). In *Jackson* v. *Schoonmaker* (*supra*) it was held that making a fence by felling trees lapping each other was not sufficient; and that case was cited with approval in *Archibald* v. *N. Y. C. & H. R. R. R. Co.* (157 N. Y. 574, 582). (See, also, *Lane* v. *Gould*, 10 Barb. 254.) The whole theory of adverse possession under such a claim would seem to be that the inclosure should be of such a character as would inform the true owner that by it the occupant claimed to be the owner of the premises, claiming to occupy and hold the same adversely to the real owner.

We think the evidence in this case wholly fails to establish that the premises in question were protected by a "substantial inclosure" upon the easterly boundary. It is not sufficient that they were thus protected upon three sides, even if we assume that the Tennison farm, Lake Ontario and the shore of Buck pond were sufficient for that purpose. It is essential, under the provision of the statute which we are now considering, that the entire premises should be thus protected. (*Pope* v. *Hanmer*, *supra*.) Witnesses called by the plaintiff state that at some time there was some kind of a fence to the east of the premises in dispute, following along the line of the old outlet of Buck pond. When or by whom such fence was constructed does not appear, and how long it continued to be a fence for any practical purpose is not indicated by the evidence. It appears that cattle from the Tennison farm passed beyond it to the east apparently at will, and that the public generally went upon the premises in dispute without reference to such fence, some of them to get sand, others to hold picnic parties on the shore of the lake. It was constructed, so far as the evidence discloses, of logs, refuse thrown up on the bank of the lake, and trees growing upon its course or line. In other words, the evidence clearly demonstrates that it was a temporary structure, during much of the time serving no purpose as a fence; at other times being more useful by preventing cattle from wandering away from the premises, or stock belonging on the adjacent property from straying upon said premises. We think there is nothing in the evidence which indicates that such fence defined or was intended to define the premises which the plaintiff claimed to be holding adversely to the real owners of the same, or that it was such a structure as proclaimed to the true owners and to the world that the occupant was in possession of the premises bounded thereby, claiming to be the owner thereof. If the plaintiff or his grantors had gone into possession of the premises and constructed the fence claiming that it bounded lands belonging to them, a different question would be presented; but, as we have seen, the fence, whatever it was, was built long years before, and without any reference to bounding the premises in question. It had no reference to the occupation of the person living in the Nash cottage, any more than to the occupant of the Tennison farm, or of premises lying to the east of the disputed land. It was as serviceable to one as to the

other, and in no manner indicated that it described the boundaries of premises claimed to be owned by the occupant of the Nash cottage. Such fence at most was a temporary affair, intermittently kept in repair by those whose purposes it served. It did not constitute a "substantial inclosure," and in no manner indicated that the owner or occupant of the Nash cottage claimed title to the premises lying to the west of such fence. We think it was not of such a character as to make it the basis of adverse possession in favor of the plaintiff.

As to the other provision of the statute, that the premises in question must be "usually cultivated or improved," no time need be spent. The premises as a whole were not cultivated or improved. Lowden, the tenant of Delos Lewis, plaintiff's immediate grantor, did cultivate some portion of the premises in dispute, but the extent of such cultivation, or the area covered thereby, is in no manner indicated by the evidence. Whether it was five or ten acres does not appear, and we think a judgment of adverse possession of the whole premises cannot be based thereon.

We are thus led to inquire whether the Nash deed, taken under the circumstances disclosed by the evidence, can be made the basis of adverse possession in favor of the plaintiff. We are constrained to hold that the question of the good faith of plaintiff's grantor in taking the deed is of no consequence; that such a deed, no matter how fraudulent in its inception, or how defective in its execution, may be made the basis of adverse possession of the premises described therein, if the person occupying a portion thereof claims title thereto, founding his claim upon such deed, provided such occupancy and claim is such as is defined in section 370 of the Code of Civil Procedure.

In *Livingston* v. *Peru Iron Co.* (9 Wend. 511) the contrary rule was adopted, and it was held: "A deed fraudulently obtained is not available as the foundation of an adverse possession, so as to avoid a subsequent conveyance. * * * To constitute a possession adverse so as to bar a recovery, or to avoid a deed subsequently executed by the true owner, the party setting up the possession must, in making his entry upon the land, act *bona fide*. * * * But if the title be an absolute nullity, as a deed obtained by fraud or forgery, it will not serve as the foundation of an adverse possession."

The same rule was held in *La Frombois* v. *Jackson* (8 Cow. 595) and in other earlier decisions in this State, as well as by the highest court of many of the sister States. (*McCamy* v. *Higdon*, 50 Ga. 629; *Bowman* v. *Wettig*, 39 Ill. 428; *Smith* v. *Young*, 89 Iowa, 338; *Den ex dem. Saxton* v. *Hunt*, 20 N. J. L. 487.)

But we think that doctrine was expressly repudiated by the courts of this State in *Humbert* v. *Trinity Church* (24 Wend. 587). One of the head notes in that case accurately indicates the scope of the decision, and is as follows: "Neither fraud in obtaining or continuing the possession, or knowledge on the part of the tenant that his claim is unfounded, wrongful and fraudulent, will excuse the negligence of the owner, in not bringing his action within the prescribed period; nor will his ignorance of the injury, until the statute has attached, excuse him, though such injury was fraudulently con cealed by the contrivance of the wrongdoer."

In *First Society, etc., of Cincinnatus* v. *Osborne* (2 Alb. L. J. 457) it was held that possession under a void deed, with a claim of title, is sufficient to give effect to the statute.

In *Munro* v. *Merchant* (28 N. Y. 9) it was held that a deed purported to have been made by virtue of a power of attorney which was not proved, gives color of title to found an adverse possession under the statute.

In *Abrams* v. *Rhoner* (44 Hun, 507, 510) the court said: "To constitute an adverse possession it is not necessary that the title or deed under which the claim is made is rightful; the party need not produce and prove the deed under which he claims, and if, when produced, it is defective as a deed, as for want of a seal or otherwise, it will not destroy the effect of the party's possession. (*Bradstreet* v. *Clarke*, 12 Wend. 674, and cases cited.) An illustration of this principle is shown in conveyances by a pretended agent or attorney. If the power to convey did not exist, in fact, or was a forgery, yet it is sufficient to give color to the grantees' claim of title, and stands upon the same footing as a genuine deed or a deed under a valid power."

In the case of *Sands* v. *Hughes* (53 N. Y. 287) it was held: "Entry and possession of land under a deed given without right in the grantor, is entry under color of title, and the possession is adverse to the rightful owner."

While we do not consider that the question has been definitely determined by the courts of this State, we feel constrained to leave the final determination of it to the Court of Appeals, and in this case to follow what seems to be the weight of authority; and to hold that a deed, taken by a grantee who knows that his grantor had no right, title or interest in or to the premises conveyed, may, nevertheless, be made the basis of adverse possession under a claim of title founded upon such written instrument. But whatever the character of the Nash deed, it concededly being not such as to convey title to the premises, we think it cannot be made available to the plaintiff for the purpose of establishing title to the premises in question by adverse possession under the circumstances disclosed by the evidence in this case. So far as appears no one claimed title to the premises, basing such claim upon it, unless the secret claim or intention of Delos Lewis, not in any manner manifested by word or act, worked such result. Certainly no words were spoken indicative of such intention, and, so far as any acts were concerned, the occupation of the premises was quite as consistent with a claim of title under the Tennison deed, or by the occupant of the Tennison farm, as under the Nash deed and the occupation of Lowden, as tenant of Delos Lewis. There is no evidence which tends to show that either used the portion of the premises not actually cultivated by Lowden "for the supply of fuel or of fencing timber, either for the purposes of husbandry or for the ordinary use of the occupant;" neither does the evidence indicate that the premises in dispute were "a known farm," within the meaning of section 370 of the Code of Civil Procedure. The premises in dispute were in no sense "a known farm." They were simply an unoccupied beach on one of the great lakes, surrounded, to be sure, to some extent, by natural boundaries, but at all times accessible to the public, except the small portion which was cultivated by Lowden.

There ought to be no dispute about the facts in this case, especially in view of the decision upon the former appeal, which was followed by the learned justice who presided at the trial we are now reviewing and who held that the plaintiff acquired no title to the premises in question by virtue of the Tennison deed or under any claim of adverse possession founded thereon. We are, therefore, confined strictly to the proposition whether or not the plaintiff

acquired title to the premises in dispute by adverse possession, either because the same were protected by a "substantial inclosure" or were cultivated or improved, or whether such premises were acquired by adverse possession under a claim of title founded upon the Nash deed, which it is asserted may take the place of such substantial inclosure or cultivation and improvement. As before indicated, the premises as a whole were not protected by a "substantial inclosure," neither were they "usually cultivated or improved."

It is not enough, in order to constitute adverse possession, that a party enter into possession of premises and fence it without any claim of title. (*De St. Laurent* v. *Gescheidt*, 18 App. Div. 121.)

There must be something to indicate that the occupant claims to own the premises under a deed which bounds or describes the same. As we have seen, the foundation or basis of the acquisition of lands by adverse possession is that the person claiming such title has entered into the possession of the same in hostility to the right of the owner and in such manner as to proclaim, not only to the owner, but to the world, that he, such occupant, claims to own the premises. Such possession must be open, notorious and adverse. Under the statute it may be indicated by a "substantial inclosure," by usual cultivation or improvement, or by deed which describes the premises, the boundaries of which take the place of the inclosure or cultivation, but in either case we think the occupation must be such as in some manner to indicate that the occupant claims to own the premises. In the case of occupancy under an instrument in writing, if the premises are "a known farm," the occupation of a portion will suffice, but this is upon the theory that the boundaries of the "known farm" are known, and the occupation of a part is notice to the owner that possibly his rights are being infringed upon. So, also, where a portion of the premises has been used "for the supply of fuel or of fencing timber, either for the purposes of husbandry or for the ordinary use of the occupant." In either of such cases the nature of the occupancy indicates to the real owner the possible adverse possession of the occupant, and he has opportunity to protect himself, and prevent such adverse possession from ripening into title of his premises in favor of such occupant. It is not the law, however, that a person may enter upon a tract of land under a deed from a mere "squatter" whom he knows has no right, title or interest in or to the premises which he assumes

to convey; retain such deed in his possession without disclosing its existence and without making any claim to the ownership of the premises therein described under it; then install such "squatter" in the premises as tenant; doing no act or thing other than would be done if the occupation was simply that of a "squatter;" in no manner indicating to the true owner that he, the grantee in such deed, claims to own the entire premises, and then assert, after the lapse of twenty years, that he is the owner of the fee of the entire premises described in such deed. It is incumbent upon the occupant of property, who claims to have acquired title by adverse possession, to show either that the premises were protected by a "substantial inclosure," or that they were "usually cultivated or improved," and that during a period of twenty years he claimed to own the premises thus inclosed, or thus cultivated or improved; or, if he claims ownership under a claim of title founded upon a written instrument, it is incumbent upon him to show that he claimed ownership by virtue of and under such instrument, and that he claimed it in such manner as would tend to indicate to the true owner the nature of his claim and possession. Title to the whole of a tract of land not "protected by a substantial inclosure," or "usually cultivated or improved," cannot be acquired by adverse possession by the occupant of a part, unless such premises are of the character described in the last paragraph of section 370 of the Code, and are used by such occupant in the manner and for the purposes indicated in subdivision 3 thereof. The lands in dispute were not used for the supply of fuel or fencing timber for the ordinary use of Lowden, and were not "a known farm" within the meaning of the statute. True, Lowden's cattle, sheep and horses sometimes pastured upon the portion of the premises not cultivated by him. So did the cattle from the Tennison farm, and to a much greater extent. Much evidence was given to the effect that this was so because the owner of the Tennison farm claimed to own the premises in dispute, under and by virtue of the Tennison deed and the mesne conveyances. Lowden occasionally cut and gathered wild grass near the lake shore; so did the owner of the Tennison farm, claiming the premises in question as a part thereof. Aside from the part actually cultivated by Lowden the premises were used indiscriminately by him, by Delos Lewis, and by any other person who

desired so do do. There was nothing to indicate, either by word or act, that any one claimed to own the entire premises under or by virtue of the Nash deed.

We think it should have appeared by some act of the claimant that he intended to occupy the whole of the premises. (*Smith* v. *Sanger*, 4 N. Y. 577.) In *Wheeler* v. *Spinola* (54 N. Y. 377) it was held that an entry upon land once a year for more than twenty years, and the cutting and removal of grass therefrom by a party who had not inclosed or cultivated it, and where it was no part of a known farm or lot occupied by him, was not sufficient to confer a title by adverse possession. In *Miller* v. *Long Island R. R. Co.* (71 N. Y. 380) it was said: "When lands are unoccupied, unimproved and uninclosed, it is quite difficult to make out such possession. It can be done by showing that the lot was kept as a wood lot of suitable size for an improved farm, and that the owner of the farm habitually for some years cut thereon his fire-wood, saw-logs and fencing and building timber. * * * It cannot be the law that one can enter upon uninclosed wood land and claim to own it, and cut wood thereon once or a number of times, and thus establish a footing that will enable him to maintain an action of trespass."

Price v. *Brown* (101 N. Y. 669) was an action for trespass upon an uninclosed sandy beach. It was sought to prove paper title to the property. One of the grantors dried grass on the land a number of times; subsequent grantors cut grass upon the beach, and subsequent and still later grantors sold some sand from the beach. The beach was never inclosed, cultivated or improved, and they never had in any way, so far as appears, the actual possession of the place where the alleged trespass was committed. It was held that the evidence thus established was not sufficient, even with the paper title, to maintain an action of trespass. (*Roberts* v. *Baumgarten*, 110 N. Y. 380.)

In an action to establish a right to land in hostility to the record title, it is necessary to show notice to the defendant of facts upon which the claim is founded, or such facts and circumstances as would put a prudent person on guard. We think such notice must be actual, open and visible occupation, not equivocal, occasional or for a special or temporary purpose. (*Holland* v. *Brown*, 140 N. Y. 344.) In other words, we think the cases clearly establish the

proposition that where there is no "substantial inclosure," and the lands are not "usually cultivated or improved," and the occupant relies upon a claim of title founded upon a written instrument, he must give some notice of his claim of title by some act, or by the nature and character of his occupancy. He must do something which indicates that he claims to own the premises. He cannot, to all appearances, be a "squatter," pure and simple, only occupying as such, and then by virtue of a secret deed, under which, so far as is disclosed by any word or act, he has never claimed title to the premises, acquire ownership by adverse possession, founded upon such deed.

As we have seen, in the case at bar the premises in dispute were not protected by a substantial inclosure. No part which is defined by the evidence was cultivated or improved, and thus there was no indication to the owner that Lowden, who occupied a shanty in one corner of the same, claimed to own the premises through himself or his alleged landlord, Delos Lewis. Neither is there any evidence to indicate that Delos Lewis, plaintiff's grantor, claimed title to the whole premises by virtue of the Nash deed, or that the possession of his tenant, Lowden, covered any more of the premises than was actually cultivated by him.

Upon the whole evidence we are constrained to hold, as matter of law, that the plaintiff failed to establish that he acquired any title to the premises in question by adverse possession. It is, therefore, unnecessary to consider any of the other questions raised by this appeal.

It follows that the judgment and order appealed from should be reversed and a new trial granted, with costs to the appellant to abide event.

STOVER, J., concurred.

Judgment and order affirmed, with costs.

FREDERICKA BERG, as Administratrix, etc., of ANDREW BERG, Deceased, Respondent, v. THE BADENSER UNDERSTUETZUNGS VEREIN VON ROCHESTER, NEW YORK, Appellant.

Mutual benefit association — change of its constitution as to allowances for sickness — when reasonable and valid.

Prior to June 1, 1893, the constitution of a society formed for the payment of sick and death benefits to members provided that in case of sickness, members should receive four dollars weekly for six months, "for the next three (3) months two dollars ($2.00) shall be paid, and for the following three (3) months one dollar ($1.00) per week, whereupon the benefits shall cease. But after the expiration of four (4) weeks he may again report sick."

In May, 1893, the provision as to benefits was amended so as to read as follows: "No. 2. The full amount of sick benefits, namely, five dollars ($5.00), shall be paid for twenty-six (26) weeks of illness, for the next thirteen (13) weeks two dollars ($2.00) shall be paid weekly, and for the next thirteen (13) weeks one dollar ($1.00) weekly. Then the sick benefits shall cease, and at the expiration of this length of time a member may never again report himself ill for one and the same disease. * * *

"Also, when a member has received sick benefits (estimated from the time of his entrance into the organization to the day of his death or withdrawal from the organization) to the amount of three hundred dollars ($300.00), he shall not be entitled to any further financial aid in case of illness."

At the time the amendment was made, no member of the society had paid, outside of the death benefits, more than fifty-eight dollars into its funds. The amended constitution provided for levying increased death benefits.

Held, that the amendment was a reasonable one and that the society had power to adopt it;

That a member who, in 1892 and 1893, had received more than $300 in sick benefits was not entitled to recover any sick benefits for illness occurring in the year 1902.

APPEAL by the defendant, The Badenser Understuetzungs Verein von Rochester, New York, from a judgment of the County Court of Monroe county, entered in the office of the clerk of the county of Monroe on the 11th day of April, 1903, upon the decision of the court, affirming a judgment of the Municipal Court of the city of Rochester in favor of the plaintiff.

Forsyth Brothers, for the appellant.

Heman W. Morris, for the respondent.

STOVER, J.:

The action was originally brought by Andrew Berg, and upon his death his administratrix was substituted as plaintiff.

Plaintiff's intestate was a member of defendant, a society formed for the purpose of rendering financial aid to sick members and burial for deceased members. The constitution in force to June 1, 1893, provided that, in case of sickness, members should receive four dollars weekly for six months, "for the next three (3) months two dollars ($2.00) shall be paid, and for the following three (3) months one dollar ($1.00) per week, whereupon the benefits shall cease. But after the expiration of four (4) weeks he may again report sick."

In May, 1893, the provision as to benefits was amended so as to read as follows:

"No. 2. The full amount of sick benefits, namely, five dollars ($5.00), shall be paid for twenty-six (26) weeks of illness, for the next thirteen (13) weeks two dollars ($2.00) shall be paid weekly and for the next thirteen (13) weeks one dollar ($1.00) weekly. Then the sick benefits shall cease, and at the expiration of this length of time a member may never again report himself ill for one and the same disease. * * *

"Also, when a member has received sick benefits (estimated from the time of his entrance into the organization to the day of his death or withdrawal from the organization) to the amount of three hundred dollars ($300.00), he shall not be entitled to any further financial aid in case of illness."

This went into effect May 31, 1893. Plaintiff's intestate was sick from February 21, 1902, to June 7, 1902, about fifteen weeks. It was admitted that plaintiff's intestate had during the years 1892 and 1893 received more than $300 for benefits. Plaintiff sued for five dollars per week during his sickness from February 21 to June 7, 1902.

The amendment which took effect May 31, 1893, was not an unreasonable one, and was within the power of the defendant to adopt. Having reference to the object of the association and the continuance of the fund, it would seem to be a wise provision and one that none could complain of. Prior to the amendment of May, 1893, the entrance fee to members was, between the ages of twenty

and forty, five dollars, and between forty and fifty, ten years, ten dollars, and the dues, fifty cents monthly.

The society was formed in 1885, so that at the time of the amendment (May, 1893) no member could have paid, outside of the death benefits, which are not under contention here, more than fifty-eight dollars, that is, ten dollars entrance fee and monthly dues of fifty cents for eight years. There is nothing unreasonable or inequitable in the amendment limiting the gross sum that any member might draw. That gross sum is so large that every member can receive a fair and full return for the sum paid in, and its limitation sufficient to prevent the depletion or destruction of the fund by one or a few members; and one who had already received many times the amount paid in could not complain that he had not received his fair proportion of benefits. Any member who had not received benefits had an opportunity, in case of sickness, to avail himself of the fund, and one who was then in health, and had received more than three hundred dollars, could not complain that he had not a fair share of the funds of the association. No vested right was impaired. It was within the power of the association to make any reasonable amendment to its constitution in furtherance of the objects of its organization, and we cannot say that the amendment made was not such an one.

Plaintiff seeks to recover five dollars per week, being the increased sick benefits under the amendment of May 31, 1893. Her intestate, the original plaintiff, attended regularly the meetings of the society, knew of the amendment and the increased dues and benefits thereby imposed and conferred, and for nine years had acquiesced. Other members have paid the increased dues, and he has remained a member presumably for the purpose of receiving the death benefits of the association which are largely increased by the amended constitution. He seeks to recover all of the benefits of the amendment and yet repudiate the obligation, the performance of which is necessary to enable the association to pay the benefits. This he cannot do. He had drawn at the time the amendment went into effect more than three hundred dollars, and had contributed less than fifty. His estate receives largely increased death benefits under the amendment.

Neither has or had any cause for complaint that they have not

received a fair share of the benefits of the association nor any right to any further sum from its treasury.

The judgment should be reversed, with costs, and judgment ordered for defendant upon the merits.

All concurred; McLENNAN, P. J., in second ground stated in opinion only.

Judgment reversed, with costs, and judgment ordered for the defendant on the merits, with costs.

JOHN F. CLARK, Respondent, v. EDWARD P. SMITH and Others, Appellants, Impleaded with Others.

Action on a promissory note — entry of judgment on the note after payment thereof — action by the defendant against the plaintiffs and their attorney to vacate the judgment and for damages — damages as an incident to equitable relief.

A check for eighty-three dollars and forty-three cents given by one Clark to the firm of Smith, Kinney & Co. not having been paid on presentation, the latter firm placed it in the hands of a collecting agency, which, in turn, delivered the check to an attorney for collection. The attorney brought an action upon the check on June twelfth, and on June fifteenth, on his own motion, wrote Clark that judgment would be entered in the action on July third, and that the costs would be nineteen dollars and sixty-two cents. Clark did not reply to the letter, but on June thirtieth sent the letters of the attorney and of the collecting agency together with one hundred and three dollars and five cents in currency to Smith, Kinney & Co. by registered letter.

The money sent to Smith, Kinney & Co. was received by their bookkeeper on July first. The active partners of the firm were then away and had no actual knowledge of the sending or receipt of the money until on or after July twelfth.

The attorney, acting in good faith and without knowledge of the sending of the money to Smith, Kinney & Co., entered judgment for one hundred and five dollars and forty-three cents on July third. Shortly after the entry of the judgment, the attorney learned of the payment to Smith, Kinney & Co. and made no attempt to enforce the judgment.

August sixth the attorney wrote Clark stating that on payment of two dollars and twenty cents the judgment would be satisfied. Clark made no demand for the satisfaction of the judgment, and on August twelfth brought an action against the attorney and the members of the firm of Smith, Kinney & Co. to

vacate the judgment as a cloud upon the title to his real property and to recover the damages sustained by him.

September eighteenth the attorney satisfied the judgment on his own motion. The action resulted in a judgment against all of the defendants declaring that the plaintiff was entitled to nominal damages in the sum of twenty-one dollars and costs.

Held, that the complaint should have been dismissed upon the merits as to all the defendants;

SPRING and HISCOCK, JJ., dissented.

That all of the defendants having acted in good faith under a mistake of fact induced by the action of the plaintiff, and the plaintiff having made no demand upon the defendants for the satisfaction of the judgment, he was not entitled to equitable relief (per MCLENNAN, P. J., and STOVER, J.);

That, not being entitled to equitable relief, the plaintiff could not recover any damages sustained by him as the award of damages is an incident to the enforcement of equitable rights, and cannot, of itself, sustain a judgment in an equitable action (per MCLENNAN, P. J., and STOVER, J.).

APPEAL by the defendants, Edward P. Smith and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Oneida on the 4th day of August, 1903, upon the report of a referee.

The action was brought to vacate a judgment and to recover damages. It resulted in a judgment against all the defendants for twenty-one dollars damages and for costs.

S. Mack Smith, for the appellants Edward P. Smith and others.

Edward K. Clark, for the appellant S. Mack Smith.

M. H. Powers, for the respondent.

STOVER, J.:

Plaintiff made his check, dated May 15, 1902, for eighty-three dollars and forty-three cents to pay his indebtedness to defendants Smith, Kinney & Co. The check was not paid on presentation, and on May twenty-fourth was placed with R. G. Dun & Co., at Binghamton, for collection. Plaintiff resides in Florence, Oneida county, and defendants in Binghamton, Broome county. The agent of Dun & Co. (Parsons) wrote to plaintiff requesting payment of the check, and receiving no response, gave the check to defendant S. M. Smith, an attorney at Binghamton, for collection. An action

was brought upon the check on June twelfth. On June fifteenth the attorney, of his own motion, wrote plaintiff that the time to enter judgment would be July third, and that the costs would be nineteen dollars and sixty-two cents. Plaintiff did not reply to this letter, but on June thirtieth sent the letters of the attorney and of Parsons and one hundred and three dollars and five cents in currency to the defendants Smith, Kinney & Co., at Binghamton, by registered letter. The attorney, having no knowledge of the sending of the money, entered judgment by default on July third. It is found that the attorney acted in good faith. He is in no way related to or connected with the other defendants. The money sent by registered letter was received by the bookkeeper of the defendants Smith, Kinney & Co. on July first. At that time Kinney had left the city and did not return until the twelfth. Defendant Smith, his partner, was absent in the Adirondacks during all of July, and the other defendant Smith, a woman, gave no personal attention to the business. None of the defendants' firm had actual knowledge of the sending or receipt of the money until on or after July twelfth.

Judgment was entered in Broome county July third, and a transcript filed in Oneida county for $105.43 on July fifth, but the deputy sheriff, calling on plaintiff, being told that this claim had been paid, took no proceedings to enforce the judgment. On July tenth the attorney, then for the first time learning of the payment, withdrew the execution and wrote plaintiff that the money sent by plaintiff was received by the bookkeeper in the absence of the members of the firm, and that the judgment would not have been entered if it had been sent to the attorney.

On August fifth the sheriff requested his fees from the attorney, and on the sixth the attorney wrote plaintiff stating the fact that on payment of the balance of two dollars and twenty cents the judgment would be satisfied.

On August twelfth this action was brought against the attorney and the members of the firm, and on September eighteenth the judgment was satisfied by the attorney on his own motion. No demand for the satisfaction of the judgment was ever made. The referee found that plaintiff was entitled to nominal damages of twenty-one dollars and costs.

The plaintiff was not entitled to recover, either at law or in equity. No cause of action was proven against the attorney. He had no knowledge of payment and was not chargeable with any knowledge of the defendants or their agent or servant. He was bound in the discharge of his duty and for his own protection to enter judgment upon the failure of the defendant (the plaintiff here) to appear in the action. No argument should be needed to establish the attorney's freedom from liability. This action being in form one in equity to remove a cloud upon title, plaintiff was bound to do equity himself, and could not hold the defendants responsible for a mistake which occurred through his own careless-less or willful act. It is quite evident that the judgment was entered without knowledge on the part of the attorney or of the agent of R. G. Dun & Co. who had the direct management of the collection of the claim that any sum had been paid. If the plaintiff had followed ordinary and usual business methods he would have sent the money to the attorney, or at least notified him of having sent it to the defendants; this would undoubtedly have prevented the entry of judgment.

It is true, perhaps, that defendants' firm were bound by the acts of their agent, but a tender of the amount to the bookkeeper would not have been a good tender. The bookkeeper had no knowledge of the suit, and in the absence of instructions awaited the return of his principal. Were this condition brought about by the negligent or willful act of the defendants, they might be said to be acting in bad faith, but no such charge is made, and it must be conceded that all of the defendants acted in good faith, but under a mistake of facts. Plaintiff himself, having brought about the condition, cannot charge defendants with the result. He was bound to do all within his power to rectify his mistake. He could not, until a demand had been made upon the defendants to satisfy the judgment, and a refusal on their part to do so, charge them with bad faith, or any inequitable invasion of his rights. Plaintiff, failing in his right to equitable relief, cannot recover the damages if any were sustained. The award of damages is an incident to the enforcement of equitable rights, but cannot of itself sustain a judgment in an equitable action. The equities falling the action must fail.

There was no evidence upon which to base a finding of damage.

The referee finds the damages nominal (twenty-one dollars). An examination of the evidence satisfies us that there was no competent evidence upon which this finding could be based. But the referee has found that damages were only nominal. Therefore, the equities being against the plaintiff, the judgment already having been satisfied and the cloud upon the title removed, there was nothing for the referee to pass upon, and the complaint should have been dismissed upon the merits.

McLENNAN, P. J., concurred; WILLIAMS, J., concurred in result; SPRING, J., dissented from that part of the decision which reverses the judgment as to all the defendants, except S. Mack Smith, in an opinion, in which HISCOCK, J., concurred.

SPRING, J. (dissenting):

I concur in that part of the prevailing opinion which reverses the judgment as to S. Mack Smith, but dissent from the residue thereof.

The plaintiff in the present action, upon ascertaining the amount of the claim, with costs, sent a check for the same to the plaintiffs in the action against him. He accompanied it with his own letter explaining for what purpose the check was sent, and also inclosed a letter from the plaintiff's attorney in the action stating the amount of costs, and also one of Mr. Parsons, the agent of the collecting agency, pertaining to the claim. While technically Mr. Clark should have sent the check to the attorney in the action, there is no indication that he was acting maliciously. The fact that he sent the correspondence and the full amount of the claim and costs shows that he was simply seeking to pay the obligation against him.

The bookkeeper of the plaintiffs in that action received the check, but did not advise the attorney thereof, although he resided in the same city as the plaintiff. Later one of the members of the firm, who was absent at the time, received the check, ratifying the transaction. In the meantime judgment was entered by the attorney, as we must assume, in good faith, and an execution issued against Mr. Clark. This judgment was, of course, a lien upon his land. He conceived that his credit had been impaired and that he had sustained other damages by the entry of this judgment and the issu-

ance of the execution. He was a grocer, buying goods, with outstanding obligations against him, and very naturally might have suffered damage as he claims.

I think two remedies were open to him: In the first place, he could make a motion in that action to open the judgment which had been entered against him by default. That would not have enabled him to recover the damages which he contended he had sustained. The action against him was one at law and the damages which he claims to have sustained arose subsequent to the commencement of the action. He also had another remedy — that was an equity action to set aside the judgment as a cloud or lien upon his real estate. (*Barker* v. *Laney*, 7 App. Div. 352; *Van Etten* v. *Hasbrouck*, 4 N. Y. St. Repr. 803; *Buffum* v. *Forster*, 77 Hun, 27; *Clapp* v. *McCabe*, 155 N. Y. 525, 533; *Shaw* v. *Dwight*, 16 Barb. 536; Pom. Eq. Juris. § 1362 *et seq.*)

This remedy was especially available to him as he sought to recover damages by reason of the improper entry of this judgment and also to restrain its enforcement. He might, therefore, in the one action obtain the setting aside of the judgment and incidentally thereto recover the damages to which he was entitled.

The referee in his report designates the damages which he awards to the plaintiff as a "nominal sum." It is unimportant how he characterizes the amount, for he states the sum to be twenty-one dollars.

After the commencement of the action the judgment was satisfied voluntarily at the instance of the judgment creditors. There was no offer or suggestion upon their part that they were willing to pay any damages or to have the action discontinued, or that the satisfaction should in any way affect the pending action. There was no other course, therefore, open to the present plaintiff except to prosecute the action. This was the situation when it was presented to the referee, and it being an equity action, although the damages awarded were small, he allowed costs to the plaintiff, which he was justified in doing. At the time of the commencement of the action the judgment was a lien, so that the action was properly commenced, and it was necessary for the present defendants to take the initiative if they desired to be relieved in any way by the satisfaction of the judgment.

The attorney for the judgment creditors was insisting upon the payment of a further sum before satisfying the judgment. It was, consequently, unnecessary to demand the satisfaction and the payment of the damages before commencing the action. In any event the only bearing of a demand was upon the question of costs, and that subject was within the discretion of the referee.

The judgment should be affirmed, with costs as to all the defendants except S. Mack Smith.

HISCOCK, J., concurred.

Judgment reversed and new trial ordered, with costs to the appellants to abide event, upon questions of law only, the facts having been examined and no error found therein.

Cases

DETERMINED IN THE

THIRD DEPARTMENT

IN THE

APPELLATE DIVISION,

January, 1904.

HATTIE C. PERRY, Respondent, *v.* AMANDA R. FRIES and Others, Defendants, Impleaded with GEORGE R. WILLIAMS, Individually and as Trustee under the Will of JOHN SOUTHWORTH, Deceased, Appellant.

Mortgage — satisfaction thereof prior to the assignment of a second mortgage on the same property — the ten years' Statute of Limitations is a defense to an action by the first mortgagee to be relieved from the satisfaction piece on the ground of mistake — it is available to the assignee of the second mortgage.

April 1, 1861, Jerome Rowe executed a mortgage to one Holmes covering two separate parcels of land, one containing twenty-seven acres and the other containing fifty acres. May 1, 1861, he executed a mortgage to one Hanmer covering the fifty-acre parcel. The mortgages were recorded in the order in which they had been executed.

April 1, 1887, the Holmes mortgage was assigned to one Perry. December 23, 1887, Perry executed a satisfaction of said mortgage, and the satisfaction piece was recorded January 4, 1888. June 27, 1894, George R. Williams purchased the mortgage given to Hanmer.

In 1900 Williams brought an action to foreclose the mortgage given to Hanmer and procured a judgment of foreclosure and sale. May 19, 1900, he purchased the premises at the foreclosure sale. On May 18, 1900, Perry commenced an action to foreclose the mortgage given to Holmes, claiming that, in executing the satisfaction piece of the Holmes mortgage, she had only intended to release from the lien thereof the twenty-seven-acre parcel, and she asked that such discharge be reformed so as to conform to her real purpose and intent, and that said mortgage be adjudged to be a lien on the fifty-acre parcel prior to the mortgage foreclosed by Williams.

Upon the trial of the action the plaintiff contended that Williams purchased the mortgage given to Hanmer with notice that the plaintiff claimed a prior mortgage lien upon the fifty-acre parcel.

Held, that a judgment in favor of the plaintiff should be reversed;

That the plaintiff's cause of action being based entirely upon her own mistake and there being no charge of fraud was barred by the ten-year Statute of Limitations contained in section 388 of the Code of Civil Procedure;

That the defense of the Statute of Limitations was available to Williams and to those claiming under him.

APPEAL by the defendant, George R. Williams, individually and as trustee under the will of John Southworth, deceased, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Tompkins on the 13th day of February, 1903, upon the decision of the court rendered after a trial at the Tompkins Special Term.

Jerome Rowe, on April 1, 1861, executed a mortgage to secure the payment to J. A. Holmes of $800 upon two separate parcels of land, one of twenty-seven acres and the other of fifty acres, which was duly recorded April 5, 1861, in the clerk's office of Tompkins county. On May 1, 1861, he executed another mortgage to secure the payment to M. J. Hanmer of $833.33 upon such fifty acres, which was duly recorded May 27, 1861, in said clerk's office.

The first mortgage, through several mesne assignments, was on April 1, 1887, assigned to this plaintiff; such assignment was recorded January 4, 1888. On December 23, 1887, Caroline Rowe had become the owner of the fifty-acre parcel, and Fanny P. Rowe had become the owner of the twenty-seven-acre parcel. William H. Van Dusen, the administrator of one Milo Van Dusen, was then, through several mesne conveyances, the owner of the mortgage on the fifty-acre parcel, this plaintiff being still the owner of the first mortgage upon both the parcels.

On such last-mentioned day, viz., December 23, 1887, the plaintiff executed and duly acknowledged a full discharge and satisfaction of her said mortgage, and on January 4, 1888, caused the same to be recorded as such in the said clerk's office. The several properties were so held until on June 27, 1893, the said administrator of Milo Van Dusen sold and assigned the said bond and mortgage on the fifty acres to George R. Williams, the defendant in this action. Subsequently, and in the year 1900, said Williams commenced an

action to foreclose said mortgage, which resulted in a judgment of foreclosure and sale, entered April 4, 1900; and on May 19, 1900, the premises were sold at public sale under such judgment to said Williams for the sum of $1,100, and on May 22, 1900, a conveyance was duly executed to him therefor.

On May 18, 1900, this action was commenced by this plaintiff, claiming that her said mortgage had never been paid and that the discharge of the same which had been recorded on January 4, 1888, was executed by her through a misunderstanding and in ignorance of its contents, and that she intended to release, and supposed she was releasing, from the lien of her said mortgage the twenty-seven acres only. And she asks that such discharge be reformed so as to conform to the real purpose and intent for which she executed it and that her said mortgage be foreclosed as against the said fifty acres and as a lien thereon prior to the said mortgage so foreclosed by said Williams.

The trial court rendered judgment granting her the relief so asked for, and from such judgment said Williams takes this appeal.

Jared T. Newman and *S. Edwin Banks*, for the appellant.

Richard H. Thurston and *Roswell R. Moss*, for the respondent.

PARKER, P. J.:

Two grounds of error are urged by the appellant on this appeal, which in my opinion require a reversal of this judgment.

The first is that the evidence does not satisfactorily show that the defendant Williams had notice that the mortgage which he purchased from Van Dusen was not the first lien upon the fifty acres therein described.

Of course it is conceded on the part of the respondent that, if Williams had the right to rely upon the record and to assume that the facts were such as appeared therefrom, he would acquire the mortgage which he purchased as a lien prior to the mortgage of the plaintiff. Her mortgage appeared upon the record as having been fully paid and discharged as against all the lands described therein. And as a matter of fact it was so discharged. The discharge which was found there was in fact executed by her, and was a contract

with all parties interested in the lands therein described that her mortgage had ceased to be a lien upon such premises.

She claims, however, that, although she did so discharge such fifty acres from the lien of her mortgage, she did not intend to discharge any more than the twenty-seven acres therein described, and that her discharge, as to the fifty acres, was executed through a mistake of the scrivener. And while she does not claim that Williams was ever informed before he purchased the Van Dusen mortgage that there was any mistake in the execution of such discharge, yet she claims that he had notice of a fact which was sufficient to put him upon inquiry and that if he, in good faith, had made such inquiry, he would have ascertained the error through which a discharge was put on record. Such notice was to the following effect: When the discharge was recorded, Caroline Rowe had title to the fifty acres, subject to the two mortgages, and continued to hold such title down to her death, which occurred sometime in 1902. In October, 1893, she applied to Williams to purchase this mortgage from Van Dusen, and at that time plaintiff claims that Fanny Rowe — her sister who was the widow of Jerome Rowe and the person who had purchased the twenty-seven acres in 1887 (when the discharge was executed and recorded) — stated to Williams that "my sister holds the first mortgage upon her property, and it has never yet been paid." This statement is claimed to have been made in contradiction to a statement just made by Caroline that the Van Dusen mortgage, which she was asking Williams to purchase and carry for her, was a first lien on the fifty acres. The claim rests entirely upon the testimony of Fanny Rowe, who clearly is not a disinterested witness, since she now claims to own more than a half interest in the plaintiff's mortgage. Williams squarely denies that any such statement was ever made to him. In the following June, after having caused a search to be made of the records in the clerk's office of Tompkins county, and discovering that the plaintiff's mortgage had been discharged, and that there was no lien on the fifty acres prior to the Van Dusen mortgage, and believing, as he testified, that such was the fact, he took an assignment thereof from Van Dusen and paid the full amount due and unpaid thereon. Williams concedes that Caroline was introduced to him by Fanny Rowe, and has evidently forgotten when that occurred. It must be

conceded that it was sometime prior to October 19, 1893, and in this respect his letter to Van Dusen of that date corroborates Fanny Rowe. But it does not corroborate her statement that on October fourth she told him that her sister held the first mortgage on the fifty acres. As to that claim she is not corroborated by any evidence in the case. Williams admits that at sometime Caroline and Fanny came to his office and stated to him that a mistake had been made in discharging the mortgage which he had purchased. He claims that they differed among themselves as to the right of the transaction, but is positive that it was sometime after he had purchased the mortgage, and that neither of them claimed that the mistake could affect his ownership. Although Williams seems to be uncertain as to when the conversation he alludes to was had, he is not at all uncertain as to the conversation itself. It was a conversation about the *discharge*, and a concession that *as to him* it was a valid one. Fanny Rowe does not pretend that when she introduced Caroline Rowe in October before the purchase, she had any conversation whatever about the discharge. Evidently the conversation which Williams admits having in his mind is not the one to which Fanny testifies, nor does it in any sense corroborate her concerning the notice which she claims to have then given. It is correct, therefore, to say that the notice upon which the plaintiff relies rests entirely upon the uncorroborated evidence of Fanny Rowe.

On the other hand, in the letter of October 19, 1903, which Williams wrote to Van Dusen concerning the request of Caroline Rowe that he purchase the mortgage, he says that he understands that it is a first claim on the place, which is difficult to understand if he had recently been notified that Fanny Rowe's sister held a mortgage ahead of it. Fanny Rowe's testimony as to this notice is not altogether convincing. If she so flatly contradicted Caroline Rowe in her statement that it was a first mortgage it is hardly credible that both Caroline and Williams would have paid no attention to her statement and allowed her to go away without an explanation. If she was correct, Caroline was making a false statement either dishonestly or ignorantly, and it is unlikely that Caroline would have allowed such a contradiction to stand without examination. Such a notice if given under such circumstances

would have caused an immediate inquiry on Caroline's part, and it is incredible that Williams would have complied with her request to carry the mortgage for her until she should have ascertained and explained to him what this claim on Fanny Rowe's part amounted to. In short, all parties acted exceedingly unnaturally if the notice to which Fanny Rowe testified was then given. On the other hand, Van Dusen testified that in the following June, when the mortgage was transferred and the money paid therefor, it was done in Williams office in Ithaca and that both Caroline and Fanny Rowe were present, and that they then both stated to Williams in his presence that the mortgage being transferred was a first claim on the land. Williams does not remember this, but Van Dusen is positive regarding it. He seems to be an entirely disinterested witness, and his evidence is entitled to great weight in the solution of this question. If his statement in this respect is true, it cannot be believed that Fanny Rowe had previously made the claim regarding her sister's mortgage which she testified to. And there does not seem to be any chance for mistake on Van Dusen's part. He either testified to a deliberate and, so far as he was concerned, unnecessary falsehood, or else he was telling the truth.

And, moreover, I cannot understand what influence would have induced Fanny to so antagonize Caroline Rowe in her effort to bring about the purchase of such mortgage by Williams. When Fanny Rowe purchased the first mortgage for the plaintiff both she and the plaintiff knew that Caroline owned the fifty acres described in the Van Dusen mortgage, and, therefore, the discharge of the twenty-seven acres in that first mortgage as to her undoubtedly operated to discharge it as a lien on the fifty acres. It is conceded that the twenty-seven acres were ample to pay it. That they both understood it to be so I have no doubt, and, therefore, I think it very unlikely that Fanny Rowe ever attempted to interfere with Caroline's plan, or that Caroline would have permitted her to do so had she attempted it. It is a significant fact that no interest was ever demanded from Caroline Rowe, or from any one else, upon the plaintiff's mortgage after it was discharged of record. The conduct of all parties indicates that the plaintiff had no intent to in any way enforce her mortgage as against Caroline's interest in the fifty acres.

The burden was upon the plaintiff to establish that Williams had the notice upon which she relies, and she should meet that burden by clear and convincing evidence. And particularly should plaintiff have tendered such proof in this case, after waiting so many years before notifying Williams of her mistake and asking the aid of equity to rectify it. She concedes that she discovered the mistake the year after Williams took the assignment from Van Dusen, and yet she made no effort to rectify it until May, 1900. Caroline Rowe, who would have been a controlling witness on this question, was then dead, and Williams had recovered a judgment of foreclosure and sale upon his mortgage against Caroline Rowe and all parties of record who had any interest in the fifty acres. After such *laches* on her part, during which the evidence of the most important witness to the transaction had become unavailable and lands had been depreciated in value and new interests therein acquired, it is especially necessary upon plaintiff's part to establish the notice upon which she relies by much more satisfactory and convincing proof than that which she has produced. The clear weight of evidence is against her claim, and hence her equities do not prevail over those of the defendant Williams.

The further claim is made by the appellant that the plaintiff's right to this relief is barred by the Statute of Limitations.

The plaintiff's cause of action being based entirely upon her own mistake, and there being no charge of fraud, section 388 of the Code, fixing the period of ten years as the limitation, controls (*Sprague* v. *Cochran*, 70 Hun, 512; *Exkorn* v. *Exkorn*, 1 App. Div. 124.) The action was brought some fourteen years after the mistake was made, and hence under such section was clearly outlawed. But the plaintiff replies that such a defense is a "*personal defense*," and that, therefore, Williams may not plead it.

When the plaintiff executed the discharge and put it upon the record, she in effect contracted with all parties who had an interest in the premises described in her mortgage that it was paid and that such premises were discharged from its lien. The instrument which, as she claims, she intended to execute was a contract with Fanny Rowe merely; but the one which she did execute and deliver was with Caroline Rowe and Van Dusen, as well as with Fanny Rowe, and they were in effect parties to that instrument. It affected their

rights in the fifty acres, and they, or those succeeding to their rights therein, were, therefore, necessary parties defendant to any action she might bring to reform such discharge and deprive them of its benefits. Surely either one of them, or Williams, as the subsequent assignee of Van Dusen, might defend against such an action to reform, by showing that Fanny Rowe had in fact paid up the plaintiff's mortgage. Such a payment would inure to their benefit and relieve their interests in the fifty acres from its lien. Being necessary parties, therefore, to such an action, and their claim that it had been paid being a good defense thereto, I see no reason why they might not plead the statute in opposition to her claim, that it was discharged through mistake instead of through payment. Plaintiff bases her cause of action upon that claim and defendant disputes it. He claims that he could prove actual payment, but that he is not obliged to do so in this action, for the reason that he may rely on her contract of discharge, and that under the provisions of section 388 of the Code she is barred from any equitable right to have that reformed. *As to such defendants* the statute is a personal defense. They do not plead it for the purpose of establishing payment of her mortgage by lapse of time. They do not claim that her debt is outlawed, but they do claim that her right to repudiate her contract, that it has been paid and discharged, is outlawed, and, as regards that question, I am of the opinion that they are personally interested in it and have the right to plead it.

Moreover, Williams has the further defense against the plaintiff's right to modify this discharge that, having relied upon it, she is estopped as against him from changing it. She replies that he had notice of the mistake. This he denies, and so an issue arises directly between them as to the very fact upon which she bases her right of action. It seems to me clear that the statute which bars her right to prove such fact and maintain this action after ten years is a statute in which he is directly interested and personal to him.

For these reasons I am of the opinion that whether or not Williams had the notice upon which the plaintiff's right to reform this discharge is based, he may claim that the statute bars her right to compel him to litigate that question at this late day.

I do not examine the several other questions, both of law and of fact, which the appellant raises on this appeal. It becomes unneces-

sary to do so, inasmuch as, for the reasons above stated, this judgment cannot be sustained.

The judgment must be reversed and a new trial granted, with costs to the appellant to abide the event.

All concurred.

Judgment reversed on law and facts and new trial granted, with costs to appellant to abide event.

JOHN L. HENNING, as Trustee under the Last Will and Testament of GEORGE W. MORTON, Deceased, Appellant, Respondent, v. HUDSON VALLEY RAILWAY COMPANY, Respondent, Appellant.

Street railroad, having the consent neither of the public authorities nor abutting owners — it is a trespasser — right of an abutting owner, not owning the fee of the street, to restrain the running of cars in front of his lot.

A street railway company which constructs its railroad in a town highway, without the consent of the public authorities or of the abutting owners, is a trespasser, and it seems that an abutting owner, although having no title to any part of the street itself, has, by reason of his abutting ownership, a sufficient special interest to entitle him to an injunction restraining the street railway company from operating the railway.

If his status as an abutting owner does not, of itself, give him a special interest entitling him to maintain such an action, such special interest may be found in the fact that the railway is laid within three feet of the curb on his side of the street, and that the cars operated over the railroad extend to within six or eight inches of the curb, thus imposing upon the driver of any vehicle stopping before the abutting owner's premises the necessity of being constantly on the outlook for approaching cars, and constituting a danger to those passing in and out of the abutting owner's premises.

Where, in such a case, it appears that the mere presence of the rails is in no way injurious to the abutting owner, the railway company will not be required to remove the rails, but will simply be restrained from operating the railway in front of such owner's premises.

CROSS-APPEALS by the plaintiff, John L. Henning, as trustee under the last will and testament of George W. Morton, deceased, and by the defendant, the Hudson Valley Railway Company, from portions of a judgment of the Supreme Court, entered in the office of the clerk of the county of Saratoga on the 24th day of April, 1903, upon the decision of the court, rendered after a trial at the Saratoga

Special Term, enjoining the defendant from operating its road in certain parts of the village and town of Saratoga Springs.

John L. Henning and *Walter H. Cogan*, for the plaintiff.

J. A. Kellogg, for the defendant.

PARKER, P. J.:

I concur with the conclusion of the trial judge concerning the rights of the plaintiff as to so much of the defendant's road as is within the *village* of Saratoga Springs. The plaintiff is entitled to no relief so far as that part of the road is concerned. I further concur in his conclusion that, as to so much of the road as extends easterly beyond the village line into the *town* of Saratoga Springs, it is an unlawful and unauthorized structure in the public street. As to that portion of Lincoln avenue the plaintiff lacks both the consent of the public authority and of the abutting owners, and in the construction or maintenance of its road thereon it is a trespasser. I also agree that by the use of such portion of its road for storing cars thereon, such an injury was sustained by the plaintiff as warrants a judgment in his favor, restraining the defendant from so doing; but I am of the opinion that he should have gone farther, and also held that the plaintiff was entitled to an injunction restraining the defendant from running any cars over that portion of its road, or in any manner operating the same. That portion of his finding, therefore, that determines that the plaintiff "is not entitled to a judgment restraining the defendant from using such extension for the passage of its cars over the same, because the same does not interfere with ingress and egress to plaintiff's premises, and he has suffered no damage therefrom," cannot be sustained.

It seems to me to be very well settled that when a railroad company is a mere trespasser in a public highway, an abutting owner, although he has no title to any part of the street itself, has a "sufficient special interest to maintain, on his own behalf, an action for its abatement." Such was the rule expressly held in *Irvine* v. *Atlantic Avenue R. R. Co.* (10 App. Div. 560). It is held upon the theory that such an obstruction in the road is a public nuisance, and its mere existence there indicates an injury that is special and peculiar to the premises adjacent, as distinguished from the public at large.

(See, also, *Merriman* v. *Utica Belt Line St. R. R. Co.*, 18 Misc. Rep. 269, 274, 275.)

But if a more restricted view be taken, and we hold that some evidence of a special damage to the plaintiff must be given, I am of the opinion that it has been given in this case. It appears that the defendant's track is laid within three feet of the curb on the plaintiff's side of the street; that when a car is run over that track it extends over to within six or eight inches of such curb. From this it necessarily appears that whenever any one would drive up to the plaintiff's premises his horse and vehicle would stand on the track and no car could pass without running over him. Thus one must be constantly on the lookout to protect himself from that danger. Under such a situation no hitching post or horse block could be maintained opposite the plaintiff's premises; no one could drive up to and stop before them with safety. Although I will concede that the mere *existence* of the tracks and ties located there would not be a serious inconvenience to the use of such premises, yet the passage of cars over them, as so located, would be not only a constant source of danger whenever it was necessary to cross into or out from such premises, but would be a substantial prohibition against driving up and remaining in front of them. It would deprive such premises from the benefit of a very necessary and usual use of the highway. That such an obstruction in the highway would depreciate the market value of the plaintiff's premises seems to me very clear. Such damage seems also to be peculiar to the premises in question and, therefore, special to the plaintiff. It is clearly different from that which the traveling public sustains by reason of such obstruction, and although being an unlawful obstruction in a public highway, it is a public nuisance, yet, being located as it is, and operating as it does to substantially prohibit access up to the plaintiff's premises in the manner above stated, it works as to him a special damage, which authorizes him to ask that the defendant be enjoined from continuing it.

In referring to the nature and extent of the injury which an abutting owner must sustain to maintain such an action, the court in *Black* v. *Brooklyn Heights R. R. Co.* (32 App. Div. 472) said: "Where the encroachment is upon an existing right, slight proof of special damage would suffice to sustain an action, and as consent of

the abutting owners upon the street is required before the tracks can be lawfully laid in the street, it comes dangerously near to raising a presumption of damage sustained by the owner where there is entire failure to comply with the law in this respect. When such condition stands alone, unaffected by anything else, we think the court justified in upholding the right in such owner to have the unlawful operation cease upon proof of special damage, however slight."

So, in the same case (on p. 473), it seems to be squarely held that the court may conclude that an abutting owner suffered some special damage from the mere passage of cars through a narrow street.

I conclude that the plaintiff was entitled to a judgment restraining the defendant from operating its road at all opposite his premises in Lincoln avenue east of the village line, and I would conclude that he was also entitled to a judgment requiring the defendant to remove its tracks entirely from opposite such premises, were it not that the trial court has found that the mere existence of the rails and ties placed therein are in no way injurious to the plaintiff. It may be that they are not if cars are not run upon them, and for that reason I would modify the judgment only in the particular first above stated.

Judgment modified as per opinion, and as so modified unanimously affirmed, with costs to the appellant; HOUGHTON, J., not sitting.

MARY O. HEATER, Respondent, v. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Appellant.

Negligence — collision between a wagon and a railroad train — contributory negligence, not imputed to a woman riding with her husband — injury to their child — proof as to the expense incurred for a physician's services, not paid for — extra nursing and care of the child.

In an action brought by a woman to recover for money expended and liabilities incurred for medicine and medical expenses for her infant child, it appeared that while the plaintiff, with her husband and infant child, was riding in a carriage across the defendant's railroad at a crossing, the carriage was struck by one of the defendant's trains which had given no warning of its approach, and the plaintiff's husband was killed and her child injured.

At the time of the collision, in which the wagon was struck on the right side, the plaintiff's husband was driving and the plaintiff was sitting on his left holding

in her arms the child, which was then fifteen months old. The accident occurred on a stormy and sleety night in November. Both the plaintiff and her husband were unfamiliar with the crossing, and the train could only be seen for a distance of about sixty feet before the track was reached.

Held, that it could not be said that the plaintiff was guilty of contributory negligence as matter of law in failing to look around her husband to observe the approach of the train;

That while it was probably true that the plaintiff could recover for any liability she incurred for physician's services rendered necessary by her child's injuries, even though she had not paid those claims, and no demand for payment had been made upon her, it was necessary that the nature and exent of such liability should be clearly established before the defendant could be called upon to pay the amount thereof;

That, there being no proof of any liability incurred for nursing the child, or as to the extra time and nursing required of the plaintiff, it was improper for the court to charge that the jury might estimate the time and award a reasonable sum for extra nursing and care required by the child.

APPEAL by the defendant, The Delaware, Lackawanna and Western Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Sullivan on the 21st day of May, 1903, upon the verdict of a jury for $1,500, and also from an order entered in said clerk's office on the 21st day of May, 1903, denying the defendant's motion for a new trial made upon the minutes.

Upon the 22d of November, 1892, the plaintiff, with her husband and child, drove in a buggy from Walpac to Belvedere in the State of New Jersey. Upon their return home they had occasion to cross the track of the defendant's road at a place called Hope Crossing. The carriage was struck by one of the defendant's engines, plaintiff's husband was killed and the child was seriously injured. This action was brought to recover for the services of the child, and also for moneys expended and liabilities incurred by reason of medical attendance and medicines rendered necessary by reason of the injuries which the child sustained. Upon the trial the plaintiff's cause of action for loss of services of the child was dismissed. She recovered, however, a verdict of $1,500. From the judgment entered upon this verdict, and from the order denying defendant's motion for a new trial, this appeal is taken.

Hamilton Odell and *Hammond Odell*, for the appellant.

Walter K. Barton and *William D. Tyndall*, for the respondent.

SMITH, J.:

Defendant strenuously insists that this complaint should have been dismissed for the contributory negligence of the plaintiff. The horse was being driven by her husband, whose negligence confessedly is not imputable to her. She was riding upon his left, with the care of a fifteen months old child, in a stormy and sleety night in November. Defendant's train came from her right without warning by bell or whistle. Both she and her husband were unfamiliar with this crossing, neither of them having ever passed it until the morning of the accident. It clearly cannot be said as a matter of law that the plaintiff was guilty of contributory negligence in failing to look around her husband to observe the approach of the train, which could only be seen for about sixty feet before the track was reached. If this were an action to recover for the death of the husband, who was driving, where his negligence was the question involved, a different rule might apply.

We think this judgment, however, must be reversed because of errors committed upon the trial. It is probably true that the plaintiff can recover for any liability she has incurred for physicians' services made reasonably necessary by the injuries which her child sustained, even though she may not have paid those claims. Where, however, the claims have not been paid, and no demand appears to have been made for the payment of those liabilities, the proof should be very clear as to the nature and extent of those liabilities before the defendant should be called upon to pay therefor. Neither the nature of the services rendered by some of the different physicians employed, nor the extent of their services, is shown with any sufficient clearness upon which can be based a judgment for liability incurred therefor. Nor has the value of such services been adequately proved. The only evidence as to value is the evidence of a country physician, who has based an estimate without accurate knowledge either of the nature or extent of the services rendered, and as to some of the special services claimed to have been rendered, without adequate knowledge of the value of such services. Plaintiff has here recovered for the services of one physician employed by the defendants for whose services no liability whatever is shown against the plaintiff. Plaintiff has recovered for

services of experts for work done in public hospitals known, as shown by the evidence, as free hospitals. Without specifying in detail defendant's objections to evidence as to the value of the services rendered which we deem to have been improperly overruled by the court, it is sufficient to say that we find a proper foundation for a small part only of the judgment which has been rendered in this action.

At the end of the charge the plaintiff's counsel asked the court to charge that they might properly estimate the time and award a reasonable sum for extra nursing and care required by the child. To this the court answered, "Yes," and the defendant excepted. There is no proof of any liability incurred for nursing of the child, and even if the mother could recover for extra time and nursing required of her, there is no proof of value of such time and nursing. There is no evidence upon which such an estimate of damage could properly be left to the jury, and it was error to allow them thus to increase the verdict as they might choose upon mere speculation.

For these reasons the judgment must be reversed and new trial granted.

All concurred; HOUGHTON, J., not sitting.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

JEROME WALSH and Others, as Copartners of the Firm of WALSH BROS. & CO., Respondents, v. EMPIRE BRICK AND SUPPLY COMPANY, Appellant.

Costs where an action is severed — offer of judgment generally, where two causes of action are stated — effect of an acceptance thereof — relief where the acceptance is inadvertently made.

The complaint in an action set forth two causes of action for the breach of two separate contracts. The answer contained a denial of the facts constituting the first cause of action and admitted the second cause of action. The defendant served with the answer an offer of judgment for the amount demanded in the second cause of action together with costs. Within ten days thereafter the plaintiffs served a written acceptance of the offer of judgment and notice

of taxation of the costs. Before the judgment was entered upon the offer the plaintiffs applied for and obtained an order permitting them to enter judgment on the second cause of action, and to prosecute the first cause of action.

Held, that section 511 of the Code of Civil Procedure does not entitle a plaintiff who sues upon several causes of action, one of which is admitted by the answer, to sever the causes of action and to enter judgment for the amount of the admitted cause of action with costs; the costs are not allowable unless he elects not to continue the action as to the remaining causes of action;

That, assuming that an offer of judgment may be made applicable to one of several causes of action alleged in a complaint, and that upon its acceptance the court may permit the action to be continued as to the remaining causes of action, the plaintiffs in the present case would not come within this principle, as the offer of judgment was not specifically made applicable to any particular cause of action, but was made generally in the action, and that its acceptance must be deemed a settlement of all damages claimed in the action;

That the order allowing the continuance of the action as to the first cause of action could not be permitted to stand on the theory that it operated to relieve the plaintiffs from the consequences of inadvertent or mistaken practice, as the plaintiffs' attorney swore that he had authority to accept the offer.

Semble, that if it should appear that the plaintiffs' attorney was not authorized to accept the offer, as it was construed by the Appellate Division, the Special Term might grant the plaintiffs relief.

APPEAL by the defendant, the Empire Brick and Supply Company, from an order of the Supreme Court, made at the Albany Special Term and entered in the office of the clerk of the county of Columbia on the 15th day of October, 1903, granting the plaintiffs' motion to sever the causes of action set forth in the complaint.

The complaint in this action set forth two causes of action, upon the first of which plaintiffs demanded judgment for the sum of $5,457.80 as damages for an alleged breach of contract. In the second cause of action plaintiffs demanded judgment for $798.86 as damages for the alleged breach of another contract, with interest from October 1, 1902. Defendant interposed an answer containing denials of the facts alleged as the plaintiffs' first cause of action, and admitting the facts alleged as the plaintiffs' second cause of action. Together with the answer was served an offer of judgment for the sum of $798.86, with interest from October 1, 1902, with costs. Within ten days thereafter the plaintiffs served upon the defendant a written acceptance of the offer of judgment and notice of taxation of costs. Thereafter, and before judgment was entered upon said offer, plaintiffs noticed a motion upon the summons and complaint,

answer, offer of judgment, acceptance, and the affidavit of plaintiffs' attorney, for an order permitting plaintiffs to prosecute this action upon the first cause of action set forth in the complaint, and directing that this action be severed pursuant to the provisions of section 511 of the Code of Civil Procedure, and that the said order provide that plaintiffs have leave to enter judgment for the part of plaintiffs' claims herein admitted by the defendant to be just and pursuant to defendant's offer of judgment herein accepted by plaintiffs, with like effect as to subsequent proceedings in this action as if it had been originally brought for the remainder of plaintiffs' claim.

Upon that motion the defendant appeared and objected that both causes of action were settled by the plaintiffs' acceptance of defendant's offer of judgment. This objection was overruled, and the court at Special Term directed the severance of the action and the entry of judgment for the cause of action admitted, together with costs, with leave to the plaintiffs to prosecute the cause of action first contained in their complaint. From this order the defendant has appealed.

George Coggill, for the appellant.

D. H. Daley, for the respondents.

SMITH, J.:

Under section 511 of the Code of Civil Procedure upon admission by defendant of the facts constituting the plaintiffs' second cause of action, in the absence of an offer of judgment and acceptance thereof, the plaintiffs were entitled to a severance of the action, with judgment upon the cause of action admitted. Under that section the plaintiffs were not entitled to costs unless they elected not to continue the action as to the remaining cause of action. (*Waite* v. *Kaldenberg Co.*, 68 Hun, 528.) The offer of judgment, however, for the exact amount claimed in plaintiffs' second cause of action was an offer of judgment with costs, and has been apparently construed by the Special Term as an offer of judgment upon the second cause of action, and, as such, judgment has been ordered in accordance with the offer and acceptance. Assuming for the argument that an offer of judgment may be made applicable by the defendant to one of several causes of action stated in

the complaint, upon the acceptance of which the court would be authorized to sever the action giving judgment for the amount offered, and continuing the actions as to the remaining causes of action, this offer of judgment was not by the defendant made applicable to any specific cause of action. It was made generally in the action, and the acceptance of the offer must be deemed to be a settlement of all damages claimed in the action directly within the authority of *Shepherd* v. *Moodhe* (150 N. Y. 183). In that case the head note reads: "When, in an action of replevin for the possession of several chattels, the defendant, in his answer, claims absolute title to some of the chattels and demands judgment therefor, and serves an offer of judgment in favor of the plaintiff for all the chattels in suit except those claimed in the answer, and the offer is accepted and judgment entered accordingly, the title of the defendant to the chattels claimed in his answer and excepted from his offer is conclusively established, and the plaintiff is estopped from asserting title thereto in another action of replevin subsequently brought against him by the original defendant to recover possession of such excepted chattels, if retained by the original plaintiff under his preliminary requisition in the original action." It would seem that in the case cited the offer of judgment was as distinct and separable as it could be in any action. If the acceptance of the offer in that case was a settlement of the entire action and constituted a concession of title in the defendant to the property other than that for which the offer was made, I am unable to see why the acceptance of the offer in the case at bar is not a complete satisfaction of plaintiffs' entire claim. The order, therefore, as far as it authorizes the continuance of the action as to the first cause of action was improperly granted because the cause of action therein stated had been settled.

Nor can this order stand as the granting of relief to the plaintiffs for inadvertent or mistaken practice. It is apparent that the plaintiffs' attorney construed the offer of judgment as an offer upon the second cause of action only, and from the affidavit of plaintiffs' attorney it appears that such an offer was the one intended to be accepted. It is difficult to base relief to the plaintiffs, however, upon a bare mistake of law as to the effect of the offer of judgment. (See *Shepherd* v. *Moodhe*, 150 N. Y. 183; *Stilwell* v.

Stilwell, 81 Hun, 392; *Freudenheim* v. *Raduziner*, 10 Misc. Rep. 500.) These cases seem to construe an offer of judgment and its acceptance as an accord and satisfaction. The plaintiffs' attorney, however, has accepted the offer and has sworn to his authority so to do. It is possible if it should appear that the plaintiffs' attorney was not authorized to accept the offer as it has now been construed by this court, upon that fact being shown the court might grant the plaintiffs relief in the premises. Without deciding, however, that such facts would authorize relief to the plaintiffs, it is enough to say without such fact appearing sufficient facts are not here shown to authorize the court to relieve the plaintiffs.

The order must be modified so as to strike therefrom that provision authorizing the continuance of the action as to the first cause of action stated in the complaint, and as thus modified should be affirmed, with ten dollars costs and disbursements to the appellant.

All concurred.

Order modified so as to strike therefrom any provision authorizing the continuance of the action as to the first cause of action stated in the complaint, and as so modified affirmed, with ten dollars costs and disbursements to appellant.

CHARLES F. SHARP, as Administrator, etc., of GEORGE SHARP, Deceased, Appellant, *v.* ERIE RAILROAD COMPANY, Respondent.

Negligence — liability of a railroad company for the shooting, by its employee, who is also a police officer, of a person stealing a ride.

In an action brought to recover damages resulting from the death of the plaintiff's intestate, it appeared that the intestate was stealing a ride upon one of the defendant's freight trains as it came into the village of Salamanca; that, his presence being discovered, he jumped from the car and was chased by one Wheeler; that after he and Wheeler had passed beyond the defendant's right of way, Wheeler called upon him to stop, and upon his failure to do so, Wheeler fired a revolver, the bullet from which struck and killed the intestate. It was assumed that Wheeler's act was negligent and not willful.

Wheeler was a policeman of the village of Salamanca, a constable of the town of Salamanca, and a deputy sheriff of the county. He was also in the employ of the defendant, with instructions to protect "the company's interest on the right of way, to keep tramps from trains, and look after robberies that might occur

at stations and on freight cars, in the yards and on the tracks and in the station, and look after persons in an intoxicated condition on the company's property, and generally to look after crimes committed against the railroad company on the right of way."

Testimony was also given that it was a part of his duty as an employee of the defendant to drive and keep trespassers from the company's property; that his duties were not limited to keeping trespassers off the trains where it was to the company's interest to keep them out of the yard; that this was largely committed to his discretion.

Held, that as the intestate had committed a misdemeanor in Wheeler's presence, it was his duty, as a public officer, to arrest him and that, as the defendant had no authority to forbid him or restrain him from making such an arrest, it was not liable for the shooting.

HOUGHTON, J., dissenting.

APPEAL by the plaintiff, Charles F. Sharp, as administrator, etc., of George Sharp, deceased, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Chemung on the 13th day of January, 1903, upon the dismissal of the complaint by direction of the court after a trial at the Chemung Trial Term, and also from an order entered in said clerk's office on the 11th day of December, 1902, denying the plaintiff's motion for a new trial made upon the minutes.

The defendant operates a railroad through the village of Salamanca, in the town of Salamanca, and the county of Cattaraugus, in the State of New York. Plaintiff's intestate on the 16th day of May, 1901, was stealing a ride upon one of the defendant's freight cars as it came into the said village of Salamanca. Being warned, he jumped from the car and ran from the defendant's right of way into an adjoining piece of property. He was followed by one Wheeler, who chased him from the defendant's right of way, calling upon him to stop. After both he and Wheeler in this chase had passed beyond the defendant's right of way, Wheeler called upon him to stop, and upon his failure to do so, Wheeler fired a revolver. The bullet from the revolver struck the plaintiff's intestate and killed him. At this time Wheeler was a policeman of the village of Salamanca, a constable of the town of Salamanca, and deputy sheriff of the county. He was also in the employ of the defendant with instructions to protect "the company's interest on the right of way, to keep tramps from trains, and look after robberies that might occur at stations and on freight cars, in the yards

and on the tracks and in the station, and look after persons in an intoxicated condition on the company's property, and generally to look after crimes committed against the railroad company on the right of way. It was part of his duty to drive off and keep off trespassers from the company's property. Mr. Wheeler's duty was not limited to keeping trespassers off the trains where it was to the company's interest to keep them out of the yards; that was largely committed to his discretion." This action is brought against the defendant upon the ground that Wheeler was the servant of the defendant, for whose wrongful or negligent act the defendant is responsible. After the plaintiff's evidence was in, the trial court dismissed the complaint, and from the judgment entered upon such dismissal, and from the order denying plaintiff's motion for a new trial, this appeal is taken.

Frank C. Ogden and *D. C. Robinson*, for the appellant.

Frederick Collin, for the respondent.

SMITH, J.:

The act of Wheeler was negligent, not willful. The natural inference is that he shot to frighten without intent to wound. Plaintiff's intestate had committed a misdemeanor in Wheeler's presence. (Penal Code, § 426.) As a peace officer of the town in which this shooting occurred, he was required to apprehend him and arrest him whether on or off the defendant's right of way, and the failure to do so would have rendered him liable to prosecution as for a misdemeanor. (Penal Code, §§ 117, 154.) In making this arrest then, was Wheeler acting as a public officer with public duties, or was he acting as the servant of the defendant? If as the servant of the defendant, for his negligence in so acting the defendant is clearly liable. If as a peace officer of the town, the defendant is not liable for his negligence.

The learned trial judge properly held, we think, that Wheeler's act in making this arrest was not the act of defendant's servant. Wheeler's duty to make the arrest was entirely independent of his duty to defendant. Moreover, defendant had no authority to forbid it or to restrain it. It would be a legal anomaly to hold one responsible for the act of another which he was without authority

to forbid and without power to prevent. This want of power to prevent would seem conclusively to negative any inference that the act was done by authority of the defendant. The employment of a public peace officer by a private person assumes on the one hand the existence of certain powers and duties as a public officer, and correlatively is conditioned upon the existence of public duties to be exercised even against the will of the employer. In *Murray* v. *Dwight* (161 N. Y. 301) it is held that a truckman who transports a traveler's baggage or a merchant's goods to the railroad station, though hired and paid for service by the owner of the baggage or goods, is not the servant of the person who thus employs him. If this be true where the service is within the direct control of the employer, how much stronger should be the right of immunity where the employment is of a public officer whose acts in the public service are beyond the employer's control. Wheeler's employment by defendant was to patrol the yards that he might keep off trespassers and that he might protect the company's property by more readily detecting crimes for which, after detection, it was his official duty to arrest.

The rule of law here stated is not without authority. In *Healey* v. *Lothrop* (171 Mass. 263) a special officer was appointed at the instance of the keeper of a place of amusement in Boston for the protection of his private property, and paid for by him under a law of that State. It was held that in committing an assault and battery while in the performance of his duty, he was not the servant of the keeper of the place of amusement. While this decision was made under a law of Massachusetts, the reasoning is just as applicable to the case at bar. In fact, in the case at bar the facts would seem to give greater right to immunity, because in that case a policeman was specially appointed to protect the property of the one sought to be held liable, while in the case at bar Wheeler was the duly elected constable of the town for no special purpose.

In *Dickson* v. *Waldron* (135 Ind. 521), where a special policeman had been called on by the proprietor to quell a disturbance in a theatre, the opinion, in treating of his act as a policeman or as the servant of the proprietor, reads: "But it is said that John M. Kiley was a policeman and, therefore, appellants are not responsible for his attack upon appellee. Whether at the time of the injuries complained of

Kiley was acting as a policeman or as agent of appellants must depend upon the acts done by him. Because he was a police officer it does not follow that all his acts were those of a policeman, and because he was an agent of appellants it does not follow that all his acts were those of such agent. Even if he were a regular patrolman, called in off the street by appellants or their agents to aid in enforcing the regulations of the theater, he would, for such purpose, be only an agent of appellants, and for his conduct as such agent, within the scope of his employment, appellants would be responsible. If, however, after entering the theater, he should discover appellee in the act of violating a criminal law of the State or a penal ordinance of the city, and should proceed to arrest him for it, such act of arrest would be that of a police officer. And if such arrest were made on the officer's own motion, without direction, express or implied, on the part of appellants, then appellants would not be responsible." In *Jardine* v. *Cornell* (50 N. J. L. 486) a policeman had been called in a train to assist in ejecting a passenger, and it was there held: "If the conduct of a passenger unlawfully persisting in riding in a railroad car is such as to constitute him a disorderly person, a policeman may by virtue of his office arrest such disorderly character, notwithstanding the fact that such policeman was originally called in as an agent of the company, and for violence incident to such arrest, the company and its agents are not liable. * * *

"When a city police officer takes by force a disorderly person from the scene of disorder to the police station, such act will be presumed to have been done by virtue of his official character, notwithstanding the fact that prior to such disorderly conduct the officer was in law the agent of the defendant, and for force used in making said arrest the defendants are not liable."

In *Hershey* v. *O'Neill* (36 Fed. Rep. 171) it was held that a special patrolman appointed under section 269 of chapter 410 of the Laws of 1882, as amended by chapter 180 of the Laws of 1884, and whose services were paid for by the proprietor of a store, was not the agent of such proprietor for whose acts in making a false arrest the proprietor was liable. In *Brill* v. *Eddy* (115 Mo. 604) the opinion in part reads: "It is no uncommon thing for corporations and individuals to employ duly appointed police officers to watch their

property, and if such an officer so employed make an arrest for disorderly conduct the presumption is that he acted in his official capacity as the agent of the State, and not as the agent of his employer. Being an officer whose duties are prescribed by law, it should be presumed, until the contrary is made to appear, that his employment contemplates only the exercise of such powers as the law confers upon him." (See, also, *Tolchester Beach Improvement Co.* v. *Steinmeier*, 72 Md. 313.)

The case of *Kastner* v. *L. I. R. R. Co.* (76 App. Div. 323) holds no contrary rule of law. In that case it is not clearly indicated what were the duties of the special officer who was held to be the agent of the company, nor under what statute he was appointed. He was acting under specific instruction from the company to make arrests of persons caught stealing coal. It was, therefore, held that in making such an arrest he was acting as the agent of the company. The question does not seem there to have been raised as to the public official duty which such officer had, if any, to make an arrest for a crime committed.

We have examined the other questions raised by the appellant and find no reason therein for disturbing the conclusion of the trial court.

The judgment and order should be affirmed.

All concurred, except HOUGHTON, J., dissenting.

Judgment and order affirmed, with costs.

CHARLES A. SMITH and JOHN B. ROGERS, Respondents, *v.* JOSEPH R. WILLIAMS, Appellant.

Conditional sale — the vendee acts as agent of the vendor in making collections and holds the proceeds as a trustee — evidence to contradict, as to a consignment, a written memorandum accompanying the contract.

The firm of Smith & Rogers, manufacturers of cigars, entered into the following agreement with one Williams:

"Said parties of the first part (Smith & Rogers) to ship unto said party of the second part (Williams) cigars as ordered and selected upon consignment,

said consignment of cigars is mutually understood and agreed to be interpreted that all goods so shipped or consigned unto said second party, and all accounts resulting from the sale of said cigars by said second party, are the property of said first party until said goods are paid for at the price mutually agreed upon by the parties hereto.

"Said second party further agrees that all accounts resulting from said sale of said consigned goods will be the property of and are hereby assigned unto said first party toward the payment of the account eight hundred and twenty-six ($826.00) dollars between said second party personally or as agent and C. A. Smith, a member of the firm making the first party to this agreement, in case of the death or demise of said second party before said old account is paid.

"In case of the discontinuance of business by said second party this agreement to hold as in case of death hereinbefore mentioned."

Held, that the contract did not create a simple consignment of the goods to Williams to sell them as the agent of Smith & Rogers, but created a conditional sale with a provision that the title should remain in Smith & Rogers;

That under the terms of the contract, Williams, in making collections of the amounts for which sales were made by him, acted as the agent of Smith & Rogers, and held the moneys collected as their trustee until the price of the cigars had been paid to them;

That a written memorandum made at the time of the execution of the contract, but not made a part of such contract or signed by either of the parties thereto, which recited that it was a memorandum of the first consignment under the contract, might be contradicted or explained by parol evidence;

That the original contract, however, could not be varied by parol evidence.

APPEAL by the defendant, Joseph R. Williams, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Broome on the 18th day of January, 1902, upon the verdict of a jury, and also from an order entered in said clerk's office on the 16th day of April, 1903, denying the defendant's motion for a new trial made upon the minutes.

The plaintiffs were manufacturers of cigars at Binghamton, N. Y., and doing business under the firm name of Smith & Rogers. The defendant resided, and still resides at Syracuse, N. Y. Upon the 12th of February, 1900, the plaintiffs and defendant entered into the following contract:

"Memorandum of agreement entered into this 12th day of February, 1900, between Smith & Rogers, of Binghamton, N. Y., party of the first part, and Joseph R. Williams, of Syracuse, N. Y., party of the second part, *witnesseth*,

"Said parties of the first part to ship unto said party of the second part cigars as ordered and selected upon consignment, said consign-

ment of cigars is mutually understood and agreed to be interpreted that all goods so shipped or consigned unto said second party, and all accounts resulting from the sale of said cigars by said second party, are the property of said first party until said goods are paid for at the price mutually agreed upon by the parties hereto.

"Said second party further agrees that all accounts resulting from said sale of said consigned goods will be the property of and are hereby assigned unto said first party toward the payment of the account eight hundred and twenty-six ($826.00) dollars between said second party personally or as agent and C. A. Smith, a member of the firm making the first party to this agreement, in case of the death or demise of said second party before said old account is paid.

"In case of the discontinuance of business by said second party this agreement to hold as in case of death hereinbefore mentioned.

"This agreement to continue in force for one year from date with the privilege of five years.

"Signed and sealed this 12th day of February, 1900."

This contract was signed in duplicate. Thereafter plaintiffs furnished cigars to the defendant to the amount of $281, upon which the defendant had paid the sum of $80. These cigars had all been sold by the defendant and the accounts therefor collected. This action is brought to recover the moneys which the defendant had received upon these accounts, claimed to be held by the defendant in a fiduciary capacity. At the trial the plaintiffs recovered a verdict for $210.06. From the judgment entered upon this verdict and from the order denying a motion for a new trial the defendant has here appealed. Further facts appear in the opinion.

Henry E. Miller, for the appellant.

T. B. Merchant and *L. M. Merchant*, for the respondents.

SMITH, J.:

Defendant's answer contains denials sufficient to put the plaintiffs to their proof, and also alleges that before the commencement of the action the firm of Smith & Rogers assigned the alleged cause of action to John B. Rogers, who now is the owner and holder of the claim. This further defense is based upon the agreement dis-

solving the partnership. In that agreement the partnership of Smith & Rogers was declared dissolved except as therein specified, and it is provided: "That the said parties have adjusted all their financial matters between themselves, except as to certain book accounts against divers parties aggregating seven hundred and twelve dollars and sixty-five cents ($712.65), a list of which each party has, giving the names of parties and the several amounts owing by them, which said accounts are left open for collection, and the avails of which, when collected, or any part thereof, shall be divided equally between said parties, share and share alike." There is in this agreement no assignment of the claim to the plaintiff Rogers. For the purpose of collecting this claim and others the partnership was deemed still existing. There is no proof whatever to sustain the defendant's further defense that the plaintiff Smith has no interest in the event of the action.

There is another defense urged upon the trial and urged here, although not pleaded, to the effect that the plaintiff Smith had released the defendant from his moiety of this claim, and that, therefore, he was not interested in this action and was not a proper plaintiff. Prior to the contract which forms the basis of this action the plaintiff Smith had had dealings with one Cora B. Raynor, the daughter of the defendant Williams. There was a dispute as to whether the defendant or Cora B. Raynor was the party liable in those dealings. The amount of the indebtedness of one or the other to Smith was the sum of $826. This claim was, after the dissolution of the partnership, settled by Smith upon the payment by Mrs. Raynor of $500. Smith thereupon gave a general release which recited that in consideration of $500, paid by Cora B. Raynor, the said Smith released her and Joseph R. Williams from all claims which he had or ever had had, or which his heirs, executors or administrators shall have against said parties. At this time, by the partnership dissolution agreement, the plaintiff Rogers had in charge the collection of the partnership accounts. The moneys paid were $326 and some interest, less than the amount of Smith's individual claim against Mrs. Raynor. Under such circumstances, in consideration of $500 received from Mrs. Raynor, this release must be construed as releasing only the individual claims which the plaintiff Smith had, and cannot operate to release partnership claims

in which he had a joint interest, but which were apparently in no way contemplated by this release.

The main insistance of the defendant, however, is that these moneys were not received in a fiduciary capacity; that the contract was simply a conditional sale and that the defendant at no time became the agent of the plaintiffs for the sale of these goods. The plaintiffs, however, upon this argument claimed that this was a simple consignment to an agent to sell goods for the plaintiffs, with a provision for compensation based upon whatever might be received by him over and above the sum mentioned as the price of the article. I cannot agree with the plaintiffs' construction of this contract. It is clear to my mind that these goods were in any event to be paid for by the defendant at a price named. If any purchaser of the goods from the defendant should prove insolvent, the loss would fall upon the defendant and not upon the plaintiffs. As to the goods themselves, there was no such confidence placed in the defendant by the plaintiffs as characterizes an agency. No right was reserved to control or in any way to interfere with the sales which the defendant should make of cigars when once obtained. The usual indicia of agency are wanting. The sale is a conditional one with title remaining in the plaintiffs.

There is, however, another provision in the contract which is most significant. It is provided not only that the title of the property shall remain in the plaintiffs until the price named is paid, but also that the accounts for the sales are until that time to be the property of the plaintiffs. It is apparent that these accounts were to be collected by the defendant. In making that collection the defendant acted as the agent of the plaintiffs, and the moneys collected he held as their trustee until the price of these cigars should be paid to the plaintiffs. With any other construction this stipulation in the contract becomes ineffective. If defendant may convert plaintiffs' collateral in his hands and not be liable for breach of trust, those collaterals are valueless to the plaintiffs. The law presumes the intent of the parties to make effective every word of their contract. This action is brought, not upon his covenant to pay for the cigars, but for the moneys which the defendant has received upon the sale of these cigars under the clause of the contract that those accounts, and by inference the proceeds thereof, were to belong to the plain-

tiffs. These moneys, I think, the defendant clearly held in a fiduciary capacity. (See *Britton* v. *Ferrin*, 171 N. Y. 235.) In the case of *Weston* v. *Brown* (158 N. Y. 360) the question decided was simply as to the right to bring an action at law in a parallel case rather than an action in equity for an accounting. There were other clauses in the contract in that case which distinguish it somewhat from the case at bar. When the opinion is read, however, in view of the question there to be decided, it contains, I think, no rule of law antagonistic to the rule which we now hold. The case of *German Bank* v. *Edwards* (53 N. Y. 541) is distinguished from the case at bar in the case of *Kelly* v. *Scripture* (9 Hun, 283). There is no doubt that a creditor may intrust his collateral with his debtor to sell or collect the same for him. (*Conkling* v. *Shelley*, 28 N. Y. 360.) The proceeds of the collection when once made, however, are held in trust for the creditor, and must be paid over to the creditor upon his demand.

In the case at bar I think there were but two questions for the jury. The first question was the question of fact as to whether the defendant had collected the full amount of the moneys. He claimed upon the trial that he had collected all except forty dollars. The plaintiffs claimed to have his admission that he had collected the full amount. This issue was submitted to the jury who found for the plaintiffs thereupon. The second question arises upon the defendant's claim that the plaintiffs are entitled to no compensation under the contract until they have wholly fulfilled by delivering to the defendant the full amount of the first consignment. It will be noticed that in the contract the plaintiffs were to ship to the defendant cigars as ordered and selected. At the time of the execution of that contract a memorandum was made which recited that it was a memorandum of the first consignment under the agreement of February 12, 1900, Smith & Rogers to Joseph R. Williams. In this memorandum were specified 20,000 cigars of different kinds to be shipped. The plaintiffs, however, upon the stand swore that the goods mentioned in this memorandum were not to be shipped at once but were to be made up ready for shipment. This evidence is complained of by the defendant as contradictory of the written memorandum made at the time that the contract was made. This written memorandum, however, was not made a part of the contract. It

was not signed by the parties. The plaintiffs were at liberty, therefore, to contradict it or explain it by parol evidence. The jury were in substance told that if this agreement was an entire one, and these cigars mentioned in the memorandum were to be at once shipped, the plaintiffs could not recover in the action. Upon this question also the jury has found with the plaintiffs.

I agree with the defendant's counsel that the original contract cannot be varied by parol, and that the letters were not admissible as explanatory thereof. While much was submitted to the jury that probably was for the court to decide, nevertheless upon the two questions which we here hold were properly submitted, their verdict is for the plaintiffs, and there is no apparent reason for disturbing their verdict because other questions were submitted to them which could not in any way influence their finding upon the questions properly submitted. We think, therefore, the judgment and order should be affirmed, with costs.

Judgment and order unanimously affirmed, with costs.

HUDSON RIVER WATER POWER COMPANY, Respondent, v. GLENS FALLS GAS AND ELECTRIC LIGHT COMPANY, Appellant, Impleaded with GLENS FALLS PORTLAND CEMENT COMPANY, Defendant.

Contract to furnish electric power — assignment thereof — estoppel to object to the assignment — arbitration clause — to what question it is inapplicable — a demurrer that a counterclaim is not sufficient in law is not authorized — an objection that a counterclaim is not proper under the Code must be specified in the demurrer.

February 7, 1901, an electric power company made an agreement with a cement manufacturing corporation, by which the power company agreed to supply the cement company with electric power for a period of five years. The minimum supply was to be 1,000 horse power and an option was conferred upon the cement company to take double that amount. Payments were to be made by the cement company monthly. The contract contained the following provisions:

"*Tenth.* The Cement Company agrees, as a condition precedent hereto, that the electrical energy or power, hereby sold and to be taken by it, shall not be used or employed by it or its assigns during the continuance of this agreement, for the purpose of manufacturing pulp or paper or fiber of any kind."

"*Fourteenth.* This contract shall inure to the benefit of and become binding upon the successors and assigns of the respective parties hereto."

November 15, 1902, the cement company assigned the contract to an electric light company. November 20, 1902, the electric light company notified the power company of the assignment and paid to it the monthly installment due under the contract. December 16, 1902, the electric light company notified the power company of its intention to install on the premises of the cement company certain electrical apparatus. December 18, 1902, the electric light company notified the power company that the electrical apparatus was actually installed and demanded that the power company supply power as provided in the contract. December 20, 1902, the electric light company paid to the power company another monthly installment.

December 23, 1902, after the power company had written several letters to the light company recognizing the assignment, the power company notified the electric light company that it objected to the assignment of the contract to the electric light company and offered to submit the question of the assignability of the contract to arbitration.

The contract provided for an arbitration "whenever any question shall arise as to the true intent and meaning of any of the provisions of this contract," but the electric light company refused to submit the question to arbitration.

Held, that the power company was estopped from denying that the contract was assignable to the light company, and from insisting that it was assignable only to a successor of the cement company in the cement business;

That as the light company's right depended, not only upon the construction of the contract, but upon the question of estoppel, the controversy was not such a one as was contemplated by the arbitration clause contained in the contract.

The objection that a counterclaim is not sufficient in law upon the face thereof is not an authorized ground of demurrer to the counterclaim within section 495 of the Code of Civil Procedure.

The contention that a counterclaim is not a proper one within the provisions of the Code of Civil Procedure, is not available on a demurrer to such counterclaim unless such objection is specified in the demurrer.

APPEAL by the defendant, the Glens Falls Gas and Electric Light Company, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Saratoga on the 19th day of August, 1903, upon the decision of the court, rendered after a trial at the Saratoga Special Term, sustaining the plaintiff's demurrer to the counterclaim set up in the amended answer of the said defendant.

Plaintiff is a domestic corporation owning and controlling a dam in the Hudson river from which it obtains and furnishes electric power. The defendant company, the Glens Falls Portland Cement

Company, is a corporation engaged in the manufacture of cement in the village of Glens Falls. The defendant appellant is a domestic corporation engaged in furnishing electric power and in furnishing gas and electric light in and about the village of Glens Falls. For convenience, the defendant appellant may be called the light company, and the codefendant the cement company, and the plaintiff the power company.

Upon the 7th day of February, 1901, the plaintiff and the cement company entered into an executory contract for the sale of power by the former to the latter. The contract covered a period of five years. The minimum supply was to be one thousand horse power, with an option to the cement company to take, from time to time as it decided, up to double that amount. The power was deliverable on the cement company's property. Payments were to be made by the cement company monthly, the minimum to be paid for in any event. The five-year term was to commence at a certain period when the power company's regular service was ready. The 10th provision of the contract reads: "*Tenth.* The Cement Company agrees, as a condition precedent hereto, that the electrical energy or power hereby sold and to be taken by it, shall not be used or employed by it or its assigns during the continuance of this agreement, for the purpose of manufacturing pulp or paper or fiber of any kind." The 14th provision of the contract reads: "*Fourteenth.* This contract shall inure to the benefit of and become binding upon the successors and assigns of the respective parties hereto."

This five-year term was set in motion by virtue of a certain notification on October 1, 1902. On November 15, 1902, the cement company delivered to the light company, and the light company accepted, an assignment of this contract, "together with all the rights and privileges to which the said cement company is now entitled or to which it may hereafter become entitled under or by virtue of said contract." Upon November 20, 1902, the light company notified the plaintiff of the assignment, sending to them a copy thereof, and upon that date paid the plaintiff the monthly installment of $1,875, which was accepted by the plaintiff. On December 16, 1902, the light company notified the plaintiff that it was about to install on the premises of the cement company certain motors and transformers of standard make purchased by it from a

reputable maker, to wit, the General Electric Company, and guaranteed by the manufacturer to have a power factor or efficiency as high as any obtainable in the market, all as provided in the 2d clause of the contract. The light company at the same time offered to the plaintiff an opportunity to test the same. On December 18, 1902, the light company notified the plaintiff that the apparatus aforementioned was actually installed on the premises of the cement company as provided in the contract, and was ready for operation, and demanded that plaintiff at once make the necessary connections and supply the power as provided in the contract. Opportunity was again offered to the plaintiff to make the test mentioned in the contract. This apparatus cost the light company $5,000. On December 20, 1902, the defendant light company again duly paid the plaintiff $1,875, and plaintiff accepted the same, and at the time of this payment the light company again demanded performance of the contract on the part of the plaintiff. On December 23, 1902, after the plaintiff had several times written to the light company recognizing the assignment, and after the light company had made the two monthly payments to the plaintiff, which had been accepted, and after it had purchased expensive apparatus, the plaintiff notified the defendant light company that it objected to the assignment of the contract to the light company, and offered to submit the question of the assignability of the contract to arbitration. To that the light company replied that there was no question as to the true intent and meaning of any of the provisions of the contract upon the matter of its assignability; and that plaintiff's conduct with the light company during the thirty-four days prior thereto estopped it from raising any such question if there had been one. These facts are set up in the defendant's counterclaim, and upon them relief is asked both legal and equitable. A demurrer by the plaintiff to this counterclaim has been sustained. From the interlocutory judgment sustaining said demurrer, the defendant light company has appealed.

Howard Taylor and *William B. Anderson*, for the appellant.

Richard Lockhart Hand and *Henry W. Williams*, for the respondent.

SMITH, J.:

Plaintiff's objections to the counterclaim, as specified in the demurrer, are, *first*, that it is not sufficient in law upon the face thereof; and, *secondly*, that facts are not therein stated sufficient to constitute a cause of action. The objection first made is not an authorized ground of demurrer to a counterclaim within section 495 of the Code. The contention upon this appeal, that this is not a proper counterclaim within the provisions of the Code, cannot be here made because not specified in the demurrer. The sole question, then, for our determination is as to the sufficiency of the facts alleged in this counterclaim as constituting a cause of action. It is not necessary for us to discuss whether that cause of action, if one be stated, be in law or equity. If any cause of action be therein stated, the plaintiff's demurrer must be overruled.

The determination as to the sufficiency of this counterclaim seems to hinge upon the right of the light company secured under the assignment from the cement company of November fifteenth. The plaintiff claims that that contract was not assignable, and, therefore, that the light company obtained nothing by the pretended assignment thereof. The defendant, however, contends, *first*, that the contract was assignable as a matter of law; and, *secondly*, even though not assignable without the consent of the plaintiff, nevertheless the plaintiff has by its acts estopped itself from objecting to such assignment, and has accepted the defendant light company as the proper assignee thereof.

In our view of the facts alleged in the defendant's counterclaim it is not necessary for us here to decide whether there be in this contract any personal element which would give to the plaintiff the right to insist that it would perform its contract only with the original contracting party. When this assignment was made upon November fifteenth notice of the assignment was given and a copy forwarded to the plaintiff. Together with this notification was sent by the defendant light company a monthly installment due upon the contract, which was accepted by the plaintiff. Upon December sixteenth the plaintiff was notified that the defendant light company was about to spend a large amount of money in reliance upon their assignment, and still made no objection thereto. On December eighteenth notice was given that the apparatus was

actually installed, and a demand was made for power from the plaintiff. Upon December twentieth the plaintiff, without objection to the assignment, again received from the defendant light company another monthly installment of $1,875, and it was not until December twenty-third, after the plaintiff had written several letters recognizing the assignment, that the plaintiff assumed to offer any objection to the assignment, or made any question of the rights of the defendant light company thereunder. After the receipt of the money of the light company in payment of the installments upon said contract, with full notice of the assignment thereof, and after having permitted the light company to spend upward of $5,000 in placing apparatus upon the premises of the cement company under the contract, the plaintiff, under well-recognized principles of equity, must be held to be estopped from making objection to this assignment on the ground of any personal element which may be deemed involved in the performance of the contract, and must be held to have accepted the light company as the party entitled to the contract which it had executed originally with the cement company, unless there be something in the nature of the contract which renders impracticable its performance with this assignee.

At the time of the execution of this contract it was primarily contemplated that the power should be furnished to the cement company for its use. There are provisions in the contract especially applicable to such contemplated use. I am unable to find any provision of the contract, however, which, by fair interpretation, cannot be adjusted to the use of any assignee of such power. I apprehend that if the cement company had closed and another manufactory had been substituted upon its grounds, whose business in no way rivaled the business of the plaintiff, no question would be raised as to the assignability of the contract, or as to such interpretation thereof as to make it adaptable to the purposes of the substituted factory. If after the words "cement company," wherever the same appear in that contract, should be inserted the words "or its assigns," the contract would still be intelligible and consistent. Such words have, in effect, been inserted by the parties to the contract in the 14th provision thereof which provides that the benefits of the contract shall inure to the successors and assigns of the

cement company. I can see no reason for limiting the effect of this provision to the successors of the cement company in the cement business. No such limitation is expressed in the contract, and it could only be justified by the impossibility of its performance with some other party than a cement company. This view of the contract is also somewhat enforced by the exception in the contract that the power thus sold should not be used for the manufacture of pulp or paper or fiber of any kind. Even if we can go out of the record, and take the brief of the respondent in explanation of this provision, it still remains that by this exception is recognized the right of assignment of the power granted by the contract for other purposes.

The respondent further urges that in the counterclaim is shown a proposal of the plaintiff to arbitrate under the contract, which was refused, and, therefore, a breach of the contract which would prevent a recovery by the defendant light company. The clause in question is an agreement to arbitrate "whenever any question shall arise as to the true intent and meaning of any of the provisions of this contract." Inasmuch as the right of the defendant light company rests not only upon the provisions of the contract, but also upon acts of the plaintiff as constituting a waiver of rights which plaintiff might otherwise be held to have under the contract, the controversy here is not such a controversy as is contemplated by this provision of the contract.

The interlocutory judgment should, therefore, we think, be reversed, and the demurrer overruled.

All concurred.

Interlocutory judgment reversed, with costs, and demurrer overruled, with costs, with leave to the plaintiff to reply upon payment of costs of demurrer.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HERMAN D. HUNT, Supervisor of the Town of Preble, Relator, v. GEORGE E. PRIEST and Others, Constituting the STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF NEW YORK, Respondents.

Equalization of tax assessments — the State Board of Tax Commissioners may consider proof furnished by affidavits — what errors of the board of supervisors may be considered by the State board — not a failure to include in the aggregate valuation the valuation of bank stock — when the Appellate Division will reverse the determination of the State board.

Upon a review by the State Board of Tax Commissioners, pursuant to section 175 of the Tax Law (Laws of 1896, chap. 908), on an appeal by the supervisor of a town from a decision made by the board of supervisors of the county when equalizing the assessed valuation of the property in the various towns, the State Board of Tax Commissioners has the power to control the manner of the hearing before them and to determine what proofs shall be presented upon the questions under review. They are not confined to the reception of purely legal evidence, but may authorize proof to be made by affidavits.

An alleged error committed by the board of supervisors, in failing to include in the aggregate valuation of the property of the county the valuation of bank stock, is not an error "in the equalization of assessments" or "in the correction of the assessment rolls" under section 50 of the Tax Law, which authorizes that body to "increase or diminish the aggregate valuations of real estate in any tax district by adding or deducting such sum upon the hundred as may, in its opinion, be necessary to produce a just relation between all the valuations of real estate in the county." Errors in these respects alone are made by section 174 of the Tax Law the subject of review upon an appeal to the State Board of Tax Commissioners.

The Appellate Division will not reverse the determination of the State Board of Tax Commissioners in such a proceeding upon a question of fact, unless, upon all the evidence, the error in the conclusion of that board clearly appears.

CHASE and HOUGHTON, JJ., dissented.

CERTIORARI issued out of the Supreme Court and attested on the 12th day of December, 1902, directed to George E. Priest and others, constituting the State Board of Tax Commissioners of the State of New York, commanding them to certify and return to the office of the clerk of the county of Cortland all and singular their proceedings had in dismissing the relator's appeal to them from a decision of the board of supervisors of the county of Cortland in the equalization of the assessments and correction of assessment rolls of said county, as made on the 28th day of November, 1901.

Frank S. Black, *J. Courtney* and *T. E. Courtney*, for the relator.

O. U. Kellogg, for the respondents.

SMITH, J.:

The determination of the State board is challenged by the relator upon four grounds; *First*, that in making such determination a rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator, to wit, that the said board allowed the respondents to make proof of certain facts by affidavits presented, without producing the affiants for cross-examination; *second*, that the State board committed error in not including in the aggregate assessment of real and personal property as the basis for the determination of the tax rate the value of bank stock in the several towns in which such banks were located; *third*, that the determination of the State board was against the weight of evidence; and, *fourth*, that the allowance of costs by the State board upon the hearing was excessive, and included one item, at least, improperly.

First. In the notice of appeal from the decision of the board of supervisors notice was given by the appellant that evidence, in addition to the papers and proofs submitted to the board of supervisors on making the equalization, might be offered by either party. Pursuant to this notice, the town of Preble produced a certain schedule purporting to be a list of all the recorded conveyances in Cortland county from December, 1899, to December, 1901. This schedule consisted of a number of large sheets of paper upon which appeared in successive columns the name of the grantor, the name of the grantee, the lot number, *the consideration stated in the deed*, and the number of acres conveyed. Oral evidence was then offered by the relator as to the value of property in the town of Preble and in other towns of the county, and thereupon the relator rested. The respondents did not reach their case until the afternoon of the last day upon which the State board could sit in Cortland. Some evidence was given by the respondents upon that day. At the adjournment of the proceedings upon that day an order was entered that the respondents might present, upon the adjourned day at Albany, the affidavits of the assessors of the various towns in explanation of the facts appearing in the schedule presented by the

relator; and that such affidavits should be served upon the relator's attorneys in sufficient time so that the relator might have opportunity to answer the same. To this no objection was then made. Thereafter, however, and before the hearing at Albany, the respondents were given notice that objection would be made to the admission of such affidavits in evidence upon said appeal. Such objection was made upon the final hearing which was held at Albany, was overruled, and the affidavits were admitted as part of the evidence in the case. Assuming for the argument that these affidavits were upon material facts, if they were erroneously admitted the relator should prevail upon this appeal.

The respondents' answer to this first ground of challenge is that this review by the State board is not such a judicial proceeding as requires the application of the rules of evidence which hold in a court of law. This answer we think sufficient. In the first place, the proceeding is one in which it would be impracticable to apply the strict legal rules of evidence. Individual property rights are affected only indirectly through the tax which must ultimately be paid upon the equalized valuation. The review upon appeal from the determination of the board of supervisors, though primarily a right of appeal only, is nevertheless in the nature of an original investigation. The question to be determined involves, to an extent, the value of every piece of real property in the county. To establish those valuations by evidence admissible only in a court of law would make the proceeding so cumbersome as to make it practically impossible to prosecute, and so costly as to take from the town all benefit of a favorable adjudication.

Again, the history of the legislation giving and governing this right of appeal makes clear the proposition that this was never intended as a strictly judicial review, but was only intended as a summary review without the prescribed limitations of strict legal procedure. Prior to 1859, the determination of the board of supervisors in equalizing assessments was final. (See 1 R. S. 395, § 31.) By section 13 of chapter 312 of the Laws of 1859 an appeal was given to the Comptroller from the determination of the board of supervisors of a county in equalizing assessments. The method of procedure upon that appeal was by the statute thus prescribed: "The Comptroller shall hear the proofs of the parties which may

be presented in the form of affidavit or otherwise, as he shall direct." This right of appeal to the Comptroller was altered by the passage of chapter 351 of the Laws of 1874, in which it was provided (§ 5) that the appeal authorized by the former act should be made to the State Assessors instead of to the Comptroller, and it was therein provided: "The State Assessors are vested with and shall exercise all the powers and discharge all the duties that by said act and the amendments thereof are vested in or imposed upon the Comptroller, in lieu of said Comptroller." By chapter 49 of the Laws of 1876 more specific provision was made for the hearing of such appeals by the State Assessors, and it was therein provided (§ 1) that it should be the duty of the State Assessors "to prepare rules and regulations in relation to bringing such appeals and the hearing or trial thereof, which shall be submitted to the Comptroller for his approval, and when so approved shall be the forms, rules and regulations of said board of State Assessors, and be filed in the office of the Comptroller." Opposite the 1st sentence of section 3 of that act is the marginal note, "Nature of evidence," and the section reads: "On every such hearing or trial the evidence shall in part relate to the assessment and full and true value of real and personal property. * * * This continued to be the law until the passage of the Tax Law, which is found in chapter 908 of the Laws of 1896. Section 175 of that act reads, in part, as follows: "Appeals, how conducted.—The board of tax commissioners may prepare a form of petition and notice of appeal from decisions of the board of supervisors in the equalization of assessment, and rules and regulations in relation to bringing such appeals to a hearing or trial thereof. Such rules shall provide for a hearing on the papers and proofs submitted to the board of supervisors on making the equalization, in case the party so desires, and also, in case the notice of appeal so specifies, for the taking of additional evidence offered by either party. * * *" It will be noticed that whereas by the act of 1876 the State Assessors were required to make rules and regulations subject to the approval of the Comptroller, no such limitation is imposed upon the State Board of Tax Commissioners under the law of 1896. That board was left free to make such rules and regulations as it might see fit. The relator argues that in making rules "for the taking of additional evi-

dence offered by either party," the State board can only provide for the taking of legal evidence. In support of this argument are cited certain cases in which it is held that the proceedings in those cases are in their nature judicial, and that the specification of proofs required and evidence permitted means legal proofs and legal evidence. None of those cases, however, refer to such a proceeding as is here under review, nor do I think that the reasoning is applicable thereto. Confessedly, up to 1874 the Comptroller was authorized to "hear the proofs of the parties which may be presented in the form of affidavit or otherwise, as he shall direct." By the act of 1874 this right of appeal was given to the State Assessors who had the same power as had the Comptroller, so that up to 1876, at least, from 1859, for a period of seventeen years, the Comptroller or State Board of Assessors, to whom the appeal was allowed, might determine both the nature of proceeding and the nature of the evidence by which the proofs were to be made, unlimited by the rules which govern the admission of evidence in judicial proceedings. In 1876 the law was changed, and the State Board of Assessors were then required "to prepare rules and regulations in relation to bringing such appeals and the hearing or trial thereof, which shall be submitted to the Comptroller for his approval." In that same act, in section 3, it is provided: "On every such hearing or trial *the evidence* shall in part relate to the assessment and full and true value of real and personal property." Is it claimed that at this point there was a radical change of the procedure permitted upon such appeals, and that the rules and regulations to be prescribed by the State board must prescribe for such evidence only as would be admissible in a court of law? Such a change would, in my judgment, be marked by clear and unmistakable language which is here wanting; and moreover we have authority that after the passage of the act of 1876 the State Assessors still had the right to receive evidence which would be inadmissible in a court of law. (*People ex rel. Schabacker* v. *State Assessors*, 47 Hun, 450.) If their right to control their procedure was not limited by the act of 1876, it certainly was not by the act of 1896. By the act of 1876 the State Assessors were given power to prepare rules and regulations in relation to bringing such appeals *and the hearing or trial thereof.* In the act of 1896 the State board were required to prepare rules and regulations "in rela-

tion to bringing such appeals to a hearing or trial thereof," and it was provided that "such rules shall provide * * * for the taking of additional evidence offered by either party." The relator argues that the use of the word "evidence" in this provision of the statute has the magical effect of taking from this board of review the right to regulate their proceedings and the nature of the proof, which had existed for thirty-seven years unquestioned. Such a deduction is, to my mind, wholly without warrant. As I have indicated, the word "evidence" was used as well in the act of 1876 as in the act of 1896. The Legislature would not have failed to indicate by language positive and explicit any intention upon its part to change the nature of the review authorized by the statute from a summary and informal review to a strictly judicial review. In all these statutes is indicated to my mind a consistent purpose to make this review a summary one under the absolute control of the Comptroller, the State Assessors, or the State Board of Tax Commissioners, to whichever was given the right of appeal. They have always had, and now have, as I think, the full right to control the manner of the hearing before them, and what proofs shall be presented upon the questions under review. In *People ex rel. Schabacker* v. *State Assessors* (*supra*), Justice ALTON B. PARKER, in referring to the statutes regulating this right of review down to and including the act of 1876, says: "It seems to be apparent from the statutes thus briefly alluded to that the Legislature intended to provide a convenient and summary method of review, in cases where the board of supervisors, arbitrarily, so equalized the assessments between the several towns as to produce manifest injustice. The State Assessors were designated in 1874 as the tribunal to review such equalization, probably because of their familiarity with the subject of equalization and the assessments in the several towns and counties in the State. By a statute then in existence it was made the duty of the assessors to visit officially every county in the State at least once in two years, and they were authorized to examine supervisors, assessors and others on oath as to the values of real estate in the counties so visited. Because of the information thus acquired in the discharge of their duties they were the better fitted to speedily dispose of the questions necessarily arising on appeal from equalization made by boards of supervisors. The question presented on appeal from equalization is at

best a very difficult one to dispose of. Individuals differ very widely as a rule in placing values upon real estate, especially so when the question involved is one of assessment. It seemed to be proper, therefore, to take the course adopted by the Legislature in authorizing proof to be made by affidavit, or in such other form as the State Assessors might see fit to prescribe in view of the experience had by them in work of such a character. To have adopted the rule that hearings before the assessors should be governed by rules in force in trial of actions before courts, would necessarily have resulted in protracted and expensive litigation, and, therefore, it was provided that the assessors should make the rules and regulations governing the bringing of appeals and the hearing or trial thereof.

"It is apparent from the statutes cited that in the matter of the hearing and determination of appeals from equalization made by boards of supervisors, State Assessors clearly came within the rule laid down by the Court of Appeals in the case of the *People ex rel. Flanagan* v. *The Police Commissioners of New York* (93 N. Y. 97), to wit: 'They are a subordinate and an administrative tribunal * * * and not a court limited in its functions, within the provisions of the Constitution. Their action must be considered, having in view the special powers conferred, and the purposes for which their organization was intended, and not confined by the application of strict legal rules which prevail in reference to trials and proceedings in courts of law.'"

Second. By chapter 550 of the Laws of 1901 (amdg. Laws of 1896, chap. 908, § 24) it is provided that shares of stock of banks should be assessed upon the basis of capital stock, surplus and undivided profits; that upon such assessed valuation a tax of one per cent shall be paid which shall be distributed to the tax districts in which the shares of stock shall be taxable. This tax is to be in lieu of all other taxes upon such bank stock. In determining what part of the State and county tax should be paid by the respective towns, the board of supervisors entirely omitted the bank stock, and the rate was determined by ascertaining the ratio of the amount of real and personal property in the relator town as equalized to the amount of real and personal property of the county, in both cases excluding the bank stock. The relator now claims that the

bank stock should have been included in the aggregate valuation of the personal property in the county which would reduce the percentage of the State and county tax payable by the town of Preble. The argument is, that in the city of Cortland, for instance, upwards of $470,000 of bank stock was not considered in determining what part of the State and county tax should be paid by the city of Cortland. That the city of Cortland, nevertheless, had the advantage of the one per cent upon that valuation of bank stock, so that the percentage of the State and county tax paid by the real and personal property, other than bank stock, in Cortland, was considerably under the percentage paid by property in the town of Preble.

The answer of the respondents is that, if this valuation of bank stock had been included in the personal property taxable in the city of Cortland in determining the proportion of the State and county tax to be paid by the city of Cortland, an injustice would be done to the other taxpayers in the city of Cortland, because, as bank stock pays only one per cent tax, the other property in the city of Cortland would be required not only to pay its proportion of the tax, but an additional sum to make up the deficiency between one per cent and the amount which would otherwise be paid by the owners of the bank stock were they assessed for such stock as upon other personal property. It thus appears that in either case, whether the bank stock be included in determining the ratio of tax to be paid by the several towns, or whether it be excluded, an injustice is done to some taxpayers.

This question, however, is not, I think, before us for consideration. The board of supervisors is authorized by section 50 of the Tax Law to "increase or diminish the aggregate valuations of real estate in any tax district by adding or deducting such sum upon the hundred as may, in its opinion, be necessary to produce a just relation between all the valuations of real estate in the county." This is an act preliminary to and distinct from the act of apportioning the tax upon the aggregate valuation of personal property and real property as thus equalized. By section 174 of the Tax Law the appeal given to the State Board of Tax Commissioners is from the decision of the board of supervisors "in the equalization of assessments and the correction of the assessment-rolls." Such corrections, thus made the subject of appeal, are, as I understand it, the correc-

tions made by the board of supervisors pursuant to section 50 of the Tax Law. Upon that appeal the State board is authorized by section 176 of the Tax Law to "determine whether any, and if any what, deductions ought to be made from the aggregate corrected value of the real and personal property of such tax district as made, and to what tax district or districts in such county the amount of such deductions, if any, shall be added."

In view of the nature of the determination from which the appeal is given, I think the authority of the State board must be read to authorize deductions from the aggregate corrected value of the real and personal property of such tax district only by reason of the equalization made by the board of supervisors, found by the State board to have been improperly made. For instance, if the board of supervisors had determined the rate of tax by omitting entirely the personal property, I apprehend that the remedy of a town would not be upon appeal to the State board, but rather by a writ of mandamus. So, if error has been committed by the board of supervisors in failing to include in this aggregate valuation of the property of the county the valuation of these bank shares, this is not an error of equalization nor an error in the correction of the rolls, which errors alone are made the subject of review upon appeal to the State board.

Third. The third ground of challenge presents simply a question of fact. This court is authorized to reverse the determination of the State board only if upon all the evidence there was such a preponderance of proof against the existence of the facts there determined that the verdict of a jury affirming the existence thereof, rendered in an action in the Supreme Court triable by a jury, would be set aside by the court as against the weight of evidence. (Code Civ. Proc. § 2140.) Upon the question of value there is always a wide divergence of opinion and it is only possible to determine the question approximately. Upon this question, where there is a conflict of evidence, courts have seldom disturbed the findings of juries. In order to set aside their conclusions the preponderance should be so great that the error of their conclusions should be very clearly made to appear. We have given careful consideration to the evidence presented by the record and are unable to find a preponderance of evidence in favor of the relator's contention sufficient to justify

us in disturbing the conclusion of the State board upon this question.

Fourth. The fourth ground of challenge is as to the costs awarded by the State board. The commissioners certified the reasonable costs and expenses of the appeal to be $1,000 for the appellant and $1,000 for the respondents, which was made up in each case of $500 for services, $427.50 for disbursements and $72.50 for stenographer's fees. We see no reason for questioning the fairness of the allowance for counsel fees or for disbursements. It appears that by reason of a mistake the stenographer's fees were specified in both bills when they should only have been once allowed. It was stated upon the argument and not denied that the stenographer had in fact been paid by the respondents' counsel. The error then appears to have been in favor of the relator and one of which it cannot complain.

The determination of the State Board of Tax Commissioners should, therefore, be confirmed, with fifty dollars costs and disbursements.

All concurred, except CHASE and HOUGHTON, JJ., dissenting.

Determination of the State Board of Tax Commissioners confirmed, with fifty dollars costs and disbursements.

ORRIN J. DAVID, Appellant, v. DAVID H. BALMAT, Respondent,

Option to purchase the vendor's interest in land, provided a pending suit shall have been terminated — it cannot be enforced until the suit is terminated.

November 8, 1901, David H. Balmat agreed to convey to Orrin J. David all the interest which he had individually or as trustee in and to the talc, talcous rock and soapstone upon a certain parcel of land at any time within three months from the date of the agreement for a specified price, "provided, however, that a certain suit now pending between Mary A. Smith, as plaintiff, and myself and others as defendants, has, at the time of the acceptance of this option, been fully terminated without restricting my right to convey said premises; and in case said suit is not terminated within said term of three months, then this option may be extended until thirty days after said suit is finally terminated and decree entered therein and right of appeal expired. * * *"

Held, that the acceptance of the option on May 20, 1902, and before the suit referred to in the agreement had been terminated, did not entitle David to insist upon a conveyance from Balmat.

APPEAL by the plaintiff, Orrin J. David, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of St. Lawrence on the 16th day of March, 1903, upon the decision of the court, rendered after a trial at the St. Lawrence Special Term, sustaining the defendant's demurrer and dismissing the plaintiff's complaint.

The complaint alleges that the defendant on the 8th day of November, 1901, made and delivered to the plaintiff an option or agreement in writing the material parts of which are as follows:

"I, David H. Balmat for value received, hereby agree to sell and convey to O. J. David * * * all the right, title and interest which I individually or as trustee have, in and to all the talc, talcous rock and soapstone in and upon all that tract or parcel of land * * * containing about 150 acres, at any time within three months from the date hereof for fifteen thousand dollars, to be paid as hereinafter provided: Such sale to be made subject to the term of a certain lease heretofore given by me to said David and now held by the Union Talc Company, which lease said David is to assume and fulfill on my part; and provided, however, that a certain suit now pending between Mary A. Smith as plaintiff, and myself and others as defendants, has, at the time of the acceptance of this option been fully terminated without restricting my right to convey said premises; and in case said suit is not terminated within said term of three months, then this option may be extended until thirty days after said suit is finally terminated and decree entered therein and right of appeal expired. * * *"

The complaint also alleges: "That on or about the 20th day of May, 1902, and before the suit referred to in said option or agreement was terminated this plaintiff accepted said option to purchase, serving a notice of said acceptance on defendant" and that the plaintiff tendered performance of said agreement on his part but that the defendant refused to perform said agreement on his part. This action is brought to compel specific performance of said contract.

The defendant demurred to the complaint on the ground that it

did not state facts sufficient to constitute a cause of action. The demurrer was sustained and the complaint dismissed.

Earl Bancroft, for the appellant.

Ledyard P. Hale, for the respondent.

CHASE, J.:

The complaint having alleged that the suit mentioned in the agreement remained undetermined, the question is presented whether the plaintiff could compel the defendant to convey to him his right, title and interest individually and as trustee in and to said talc, talcous rock and soapstone before such termination. Clearly there was nothing to prohibit the defendant from including in the agreement a provision postponing the plaintiff's right to enforce the option until a time subsequent to the final termination of the pending litigation. Such provision in the agreement is for the protection of the defendant individually and as trustee as well as the plaintiff. That the right of the plaintiff to insist upon a conveyance under the agreement was expressly postponed until the final termination of the pending litigation and the time to appeal from the judgment entered therein had fully expired seems to us to be clear and certain. The meaning of the contract is not obscure, ambiguous or doubtful and the court was right in sustaining the demurrer.

The judgment should be affirmed, with costs.

All concurred.

Judgment affirmed, with costs.

MORGAN PHILLIPS and Others, Respondents, *v.* WATSON ALLEN, Appellant.

Diversion of a note from the purpose intended — right of an indorser thereof to have that question submitted to the jury — right of action on a note against the accommodation maker, by a party who acquires it from the principal debtor by whom it has been paid.

The firm of M. Phillips & Co. sold property to one Roe and also to one Allen. February 20, 1900, Roe executed a note for $200, payable to the order of Allen. Allen indorsed the note and delivered it to Phillips & Co. in payment of Roe's indebtedness. Phillips & Co. indorsed it and procured it to be discounted.

May 28, 1900, the note was renewed by a note for $206, signed by Roe and indorsed by Allen and Phillips & Co.

April 18, 1900, Allen signed a note for $200, made payable to the order of Phillips & Co. and delivered it to Phillips & Co. in payment for property purchased by him or in renewal of a previous note so given. Phillips & Co. indorsed the note and procured it to be discounted.

On June 25, 1900, when the note of April eighteenth was in the bank, then past due, Allen signed a note for $206.50 to the order of Roe. This note was indorsed by Roe and by Phillips & Co. and delivered to the bank which delivered the note of May twenty-eighth, which was not then due, to Roe.

July tenth, when the note of June 25, 1900, became due, Roe signed Allen's name to a note of $186.50. The note was then indorsed by Roe and by Phillips & Co. and was used in part renewal of the note of June twenty-fifth, Roe paying the balance in cash. The note of June twenty-fifth was delivered to Roe by the bank.

The note of July tenth, not having been paid when due, Phillips & Co. took up the note and sued Allen thereon. Allen denied making the note and the action resulted in a judgment in his favor.

In December, 1901, Roe delivered the note of June 25, 1900, to Phillips & Co. and they brought an action against Allen thereon. Allen, among other defenses, alleged that the note of June twenty-fifth was signed by him for the purpose of renewing his note of April eighteenth and that Roe and Phillips & Co. diverted the note in suit from that purpose. He also contended that Phillips & Co. were not the real parties in interest, the latter defense being based upon the fact that on or about July 17, 1900, the amount of Allen's note of April eighteenth was paid to the bank and that said note was transferred to and now was the property of Roe's wife.

Held, that it was error for the court to refuse to submit to the jury the question whether the note sued upon had been fraudulently diverted.

Quære, whether Phillips & Co. could recover on the note in suit, it appearing that it had been paid by Roe, the principal debtor, as above stated.

APPEAL by the defendant, Watson Allen, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Delaware on the 20th day of May, 1902, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 6th day of March, 1903, denying the defendant's motion for a new trial made upon the minutes.

I. L. Brayman, for the appellant.

Eugene H. Hanford and *Charles H. Seeley*, for the respondents.

CHASE, J.:

The plaintiffs are copartners doing business under the firm name of M. Phillips & Co. The plaintiffs sold property to one Roe and

also to the defendant. On February 20, 1900, Roe signed a note for $200, payable to the order of defendant, and it was indorsed by defendant and delivered to the plaintiffs, in payment of an indebtedness of Roe. The plaintiffs indorsed that note, and it was discounted at the Sidney National Bank. On May 28, 1900, this note was renewed. The amount of the renewal note was $206, payable one month from date, and it was signed by Roe and indorsed by defendant and plaintiffs. On April 18, 1900, the defendant signed a promissory note for $200, payable one month from date to the order of M. Phillips & Co., and delivered the same to the plaintiffs in payment for horses purchased by him, or in renewal of a previous note so given. This note was indorsed by the plaintiffs and discounted at said bank. On June 25, 1900, the note of April eighteenth was in said bank past due, and the note of May twenty-eighth was in said bank, but not then due. A note was then signed by the defendant for $206.50, payable on or before July tenth to the order of Roe, which note was indorsed by Roe and by the plaintiffs and delivered to said bank, and the note of May twenty-eighth was delivered to Roe. When said note became due Roe signed the defendant's name to a note of $186.50, which note he then indorsed and the plaintiffs indorsed the same and it was used in part renewal of the $206.50 note of June twenty-fifth, Roe paying the balance thereof in cash. The note of June twenty-fifth was somewhat mutilated, as is the custom of said bank when a note is paid, and it was then delivered to Roe by the bank. When the note of July tenth became due it was not paid, and plaintiffs paid the bank the amount due thereon and took the note and subsequently sued the defendant thereon. The defendant by an answer interposed in that action denied the making of said note, and the trial of that action resulted in a judgment in favor of the defendant. In December, 1901, the plaintiffs demanded of Roe the note of June 25, 1900, and Roe delivered it to the plaintiffs and they thereupon commenced this action thereon.

The defendant alleges that the plaintiffs are not the real parties in interest, and that the note of June twenty-fifth was signed by him for the purpose of renewing his note of April eighteenth and for no other purpose, and that said Roe and plaintiffs diverted the note in suit from the purpose for which it was given to them. On

or about the 17th day of July, 1900, the amount of defendant's note of April eighteenth was paid to the bank and said note was transferred to and is now the property of the wife of said Roe. The defendant admits that he signed the note in suit, and it was concededly so signed for the purpose of renewing either the note of Roe dated May twenty-eighth or the note of defendant dated April eighteenth. The court at the conclusion of the trial said to the jury: "It appears from the evidence in this case that this note in question was executed for the purpose of renewing a note signed by Hewitt Roe or a note signed by the defendant, in either event the plaintiffs are entitled to recover, so you are directed to render a verdict in favor of the plaintiffs for the sum of $207.26."

The defendant asked to go to the jury upon the questions: *First.* Whether the plaintiffs at the time they took the $186.50 note on the 9th or 10th of July, 1900, knew it was not signed by the defendant. *Second.* Whether the plaintiffs are the real parties in interest. *Third.* Whether the note in suit was diverted by plaintiffs and Roe from the purpose for which it was executed.

The court in refusing to submit the issues to the jury evidently assumed that the defendant in any action hereafter brought against him upon the note of April eighteenth could allege and prove that he gave a note to Roe and plaintiffs for the purpose of renewing said note of April eighteenth, and the court must also have assumed that such proof together with proof that a judgment had been rendered against the defendant on said note so given for the purpose of renewing the note of April eighteenth, notwithstanding such note had been diverted from the purpose for which it was given, would be a complete defense to any action so to be brought upon said note of April eighteenth. The bank was not in any way a party to the alleged diversion of said note of June twenty-fifth, and the note of April eighteenth was not paid or in any way affected by the alleged unauthorized and fraudulent diversion of such note by Roe and the plaintiffs. If an action had been brought by the bank against the defendant on the note of April eighteenth, the facts as claimed by the defendant herein would not have been a defense to such action, and if not a defense in an action by the bank such facts would not be a defense in an action brought by Mrs. Roe if she obtained her title in good faith directly from the bank. The parties to this action

are directly concerned in the question of the diversion of the note. If the plaintiffs fraudulently diverted the note from the purpose for which it was given, they should not be allowed to recover against the defendant thereon, and the question of the diversion of the note should have been submitted to the jury.

A serious question also arises as to whether the plaintiff can in any event recover on this note which was paid by Roe, the principal debtor thereon, in the manner stated. It may be assumed that the bank on discovering that the defendant did not sign the note of July tenth, could have required Roe to return the note of June twenty-fifth in exchange for the note then in their possession. That was not done. The note of July tenth was paid to the bank by the plaintiffs who had by their indorsement guaranteed the genuineness of the maker's signature thereto. The plaintiffs are the original creditors, and Roe, the original debtor, had given the note for which the note in question was used as a renewal, in payment of his indebtedness to them. As the note of June twenty-fifth was used the defendant was an accommodation maker thereof, of which fact the plaintiffs had knowledge. Whether the plaintiffs have, on their evidence, any legal claim against the defendant on the note which was so taken from the bank and held by the principal debtor for over a year before it was redelivered to the plaintiffs, is doubtful. Even if the note of June twenty-fifth was not diverted from the purpose for which it was given, if the plaintiffs when they indorsed the note of $186.50 knew that Roe had signed the defendant's name thereon, and they also knew the extent of Roe's authority from the defendant to sign his name to or on notes, and all the circumstances connected with the same, they should not now be allowed to say that the note of June twenty-fifth was not paid as against the defendant. The defendant at least should have an opportunity to have the questions of fact, the determination of which is vital to the maintenance of this action, submitted to and decided by a jury. The judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event.

All concurred.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

SEWARD CLAPPER, Appellant, v. ROBERT H. STRONG, Defendant, Impleaded with THE VILLAGE OF NASSAU, Respondent.

Mechanic's lien for a public improvement — the notice need not be verified.

The Lien Law (Laws of 1897, chap. 418) does not require the verification of notices of mechanics' liens filed against a village on account of public improvements.

APPEAL by the plaintiff, Seward Clapper, from an interlocutory judgment of the Supreme Court in favor of the defendant, The Village of Nassau, entered in the office of the clerk of the county of Rensselaer on the 14th day of July, 1903, upon an order entered in said clerk's office on the 14th day of July, 1903, sustaining the said defendant's demurrer to the plaintiff's complaint, and also from such order upon which the said judgment was entered.

N. B. Spalding, for the appellant.

S. J. Daring, for the respondent.

CHASE, J.:

The plaintiff performed work for the defendant Strong. The defendant Strong performed work and furnished materials for the defendant, the village of Nassau, a municipal corporation. Plaintiff duly filed with said village an unverified notice of lien in the form prescribed by section 12 of the Lien Law (Laws of 1897, chap. 418, as amd. by Laws of 1902, chap. 37) for the value of the work so performed by him under his contract with said Strong. This action is brought to foreclose said lien. The corporation demurred to the plaintiff's complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained and the plaintiff was given leave to amend his complaint. The respondent insists that it is necessary to verify a notice of lien on account of public improvements and that without such verification the notice is a nullity. Prior to the passage of the Lien Law above cited there were two separate acts regulating the filing of mechanics' liens, one of 1885 (Chap. 342, as amd.) where the lien was against real property for claims arising

for the improvement thereof; the other of 1878 (Chap. 315, as amd.) where the lien was against the fund in the control or a city and applicable to the payment of public improvements made by it therein. (*Brace* v. *City of Gloversville*, 39 App. Div. 25.) Some sections of article 1 of said Lien Law apply only to private property and others only to public improvements. (*Brace* v. *City of Gloversville*, 167 N. Y. 452.) Section 9 of said Lien Law relates to notices of lien on real property, and section 12 to notices of lien on account of public improvements. A lien for public improvements does not attach to any real property, but is confined to the fund in the possession of the municipality applicable to the payment of the public improvement on account of which the services were rendered or materials furnished. None of the provisions in either of the sections referred to purport to extend to or affect liens other than those expressly provided for in the section. Said section 12 is complete in itself, and it can and should be construed without reading with it section 9 which relates wholly to an entirely different lien. Only the general provisions of article 1 of said Lien Law are applicable to the different liens in said article mentioned. Section 12 of said Lien Law is a substitute for sections 2 and 3 of chapter 315 of the Laws of 1878, as amended by chapter 629 of the Laws of 1892. (Report of Commissioners of Statutory Revision 1897 [Assem. Doc. of 1897, No. 80], p. 401.) The omission from said section 12 of the provision relating to the verification of the notice of lien contained in the statutes of which said section is a substitute must have been intentional. The Lien Law does not show that it is the policy of the Legislature to prevent liens being filed without the solemnity of a verification. There is no provision in said section 12 for verifying a notice of lien on account of public improvements, neither is there any provision requiring a verification of a notice of lien provided for by either articles 4 or 5 of said Lien Law, and statements to be filed at the expiration of the first or any succeeding term of one year after the filing of a chattel mortgage, are not required to be verified. (Lien Law, § 95, as amd. by Laws of 1901, chap. 219.) We conclude that it is not necessary to verify notices of lien filed on account of public improvements. (See Heydecker Mechanics' Liens, 72, 206.) The demurrer, however, was properly sustained for the reasons stated

by the court at Special Term. (*Clapper* v. *Strong*, 41 Misc. Rep. 184; 83 N. Y. Supp. 935.)

The judgment and order should be affirmed, with costs.

Judgment and order unanimously affirmed, with costs, with leave to amend complaint upon payment of costs within twenty days after the entry of judgment of affirmance and notice thereof.

PATRICK W. CULLINAN, as State Commissioner of Excise of the State of New York, Appellant, *v.* ROBERT F. MONCRIEF and Others, Respondents.

Evidence — admissibility of slips from a cash register to prove that sales were not made — they are only admissible when the witness cannot recollect the facts without their aid.

In an action in which the issue involved is whether the defendant, a merchant, made certain sales on certain specified days, slips taken from the cash register used in the merchant's store, which automatically recorded all moneys placed therein, are inadmissible to prove that the sales in question were not made (even though the merchant testifies that he correctly entered in the cash register the proceeds of all sales made by him on the days mentioned) where the merchant claims to have a clear, positive and distinct recollection as to the occurrences in his store on the days in question and testifies that the alleged sales were not made.

The slips from the cash register are not books of account, but memoranda made by a party in his own interest, and are, therefore, only admissible as auxiliary to the party's evidence when he is unable to distinctly recollect the facts without their aid.

APPEAL by the plaintiff, Patrick W. Cullinan, as State Commissioner of Excise of the State of New York, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Rensselaer on the 20th day of March, 1903, upon the verdict of a jury, and also from an order entered in said clerk's office on the 14th day of April, 1903, denying the plaintiff's motion for a new trial made upon the minutes.

S. B. Mead and *Albert O. Briggs*, for the appellant,

Lewis E. Griffith, for the respondents Moncrief & Francis.

CHASE, J.:

The defendants Moncrief & Francis are druggists, and for more than seventeen years have been engaged in a retail drug business at No. 77 Congress street, Troy. They duly made application for a liquor tax certificate, and on July 2, 1901, obtained a certificate to traffic in liquors under subdivision 3 of section 11 of the Liquor Tax Law (Laws of 1896, chap. 112, as amd. by Laws of 1897, chap. 312).

A bond was given by them conditioned, among other things, that they would not violate any of the provisions of said law. The defendant the Fidelity and Deposit Company of Maryland was the surety on said bond. The plaintiff claims that the condition of said bond was violated on the 22d and 24th days of January, 1902, and this action is brought to recover the penalty of said bond. On the trial of the action one F., who is a special agent of the excise department, testified that on said twenty-fourth day of January, at twelve-thirty P. M., he purchased of the defendant Moncrief, at said place, a half pint of brandy without the written prescription of a regularly licensed physician, and paid him seventy-five cents therefor; and three other special agents of said department testified that they were present at said sale, and that the sale was made as testified by said F. The said witnesses for the plaintiff did not see Francis in said store January twenty-fourth.

Moncrief denied that he sold F. any brandy. Francis testified that the particular shape of bottle in which F. testified that the brandy was delivered to him had not for several years been used in said store. Moncrief also testified that he was not in the store at twelve-thirty P. M. January twenty-fourth, and that his reason for so testifying was that he invariably left the store for his dinner at or prior to twelve o'clock, and that he did not return until one or after one o'clock. He was cross-examined in relation to the time when he left the store, and testified: "I have a cash system by which I tell whether I was in the store or not; 'A' is my letter; anything charged that day, and 'A' is opposite it, is me; if it is 'B' it is my partner; those entries were made in the cash book; the cash book is in the store; I didn't bring it because I wasn't told to; I will bring it after dinner if the court says so; the cash book would not show if any entries were made between the hours of twelve and one."

After an intermission the defendant Francis was sworn and testified that they used a cash register in January, 1902, and, continuing, testified: "We press the amount of their purchase and press the number of the clerk and turn the crank and it registers on a detailed slip inside; at the end of the day we take them off and put on a fresh one, and we have the record that goes on in the store all day long; these sales are distinguished by each having a letter; Mr. Moncrief is 'A' and I am 'B;' we press 'A' for Moncrief and then the amount purchased and turn a crank and it prints a detailed slip inside; we file the slips used, put them in an envelope and date them and put them away; I keep account of that; I do it in the morning the first thing; * * * when a customer buys more than one article we put down the total amount of the purchase."

He further testified: "The machine was in good working order and registered correctly; * * * this machine has been used six years and continues to account correctly; we had no clerk in our store at this time; * * * we enter on the cash register a charge made; we make every transaction that goes in the store a record of on that slip; it goes through the cash register."

He also testified: "We keep a cash book; I have not compared the cash book with these slips; I simply brought them because the cash book and they will agree; it would take a short time to get the cash book here; I will not send over and get it because I think these slips are enough; that is the only reason I won't do it; I think that is evidence enough; my counsel did not tell me to bring the cash book."

The witness F. had also testified that he purchased a half pint of brandy of Moncrief in said store on January twenty-second. The entries in the cash register are made on narrow pieces of paper called slips. The slips from the cash register which had been indorsed January twenty-second and January twenty-fourth were offered in evidence, and the plaintiff objected to their being received in evidence on the ground that they were immaterial, incompetent and no proof of anything in the case. The objections were overruled and the plaintiff was given an exception. The witness F. testified that at the time he purchased the brandy he also purchased another article, the price of which was twenty-one cents, and that

he paid to Moncrief for the brandy and the article so purchased the sum of ninety-six cents. The slip indorsed January twenty-fourth does not contain an item of ninety-six cents. This slip was used before the jury as proof that the plaintiff's witnesses were mistaken or untruthful in saying that F. paid Moncrief ninety-six cents on said day in January. The only claim made by the plaintiff is that the brandy was sold to F. by Moncrief in the absence of Francis. There is not a word of testimony by Moncrief in any way relating to a cash register unless it is in that part of his testimony hereinbefore quoted. He did not testify that he entered in the cash register the proceeds of any or all sales made by him on the days mentioned, neither did he testify, nor is there any evidence, that the cash on hand at the close of the day balanced with the total of the items on the slip in the cash register. There is a total failure of evidence to establish the correctness of the items on the slip so far as the transaction in question is concerned.

We are also of the opinion that the slips from the cash register should not have been received in evidence even if Moncrief had testified that he correctly entered in the cash register the proceeds of all sales made by him on the days mentioned. These slips from the cash register are not books of account but memoranda made by a party in his own interest. Moncrief did not require the memoranda to aid his recollection. The memoranda were not offered or received in evidence while Moncrief was giving his testimony. They were received at a subsequent session of the court as independent affirmative evidence in favor of the defendants. Moncrief claimed to have a clear, positive and distinct recollection as to the occurrences in his store on the days in question and he testified that F. did not purchase brandy there as alleged.

The rule in regard to the admission of original entries as evidence is stated in *National Ulster County Bank* v. *Madden* (114 N. Y. 280) as follows: "Original entries made by a witness are admissible as auxiliary to his evidence only when he is unable to distinctly recollect the fact without the aid of it. This proposition seems well settled in this State by a current of authority for the last fifty years which now requires adherence to it, unless it may be seen that it works unjustly upon the rights of the parties. The rule which renders such entries admissible rests upon the principle of necessity

for the reception of secondary evidence, and is not applicable where the witness has a distinct recollection of the essential facts to which they relate. The primary common-law proof is then furnished and the necessity for evidence of the lesser degree does not arise. And this right, so qualified, to introduce such secondary evidence is the better rule in view of the opportunity which otherwise might exist to superadd a written memorandum to the evidence of a witness which it cannot be said might not sometimes be improperly made available to strengthen his testimony with a court or jury, and such may be within reasonable apprehension until the moral infirmity of human nature becomes exceptionally less than it yet has."

The court in *People* v. *McLaughlin* (150 N. Y. 365) say: "An original entry or a memorandum made by a witness at the time of a transaction is admissible in evidence as auxiliary to his testimony only when without its aid he is unable to distinctly recollect the fact to which it relates. The evidence is admitted only as a matter of necessity. Where the witness has a distinct recollection of the essential facts to which the entry relates so that primary common-law proof may be furnished, the necessity for secondary evidence does not arise and it is incompetent."

The receipt of such slips as evidence was error for which the judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event.

All concurred.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

JENNIE L. SHERMAN, Respondent, *v.* SARAH E. McCARTHY, Appellant.

An extension of time to answer is a waiver of objections to the form of a complaint.

Where the defendant in an action serves papers on a motion to strike out certain portions of the complaint as scandalous and redundant, and to require the plaintiff to separately state and number her causes of action, and, at the same time, procures from the plaintiff's attorney a stipulation extending the time to answer, which stipulation does not reserve to the defendant the right to make such motion, the motion, if not made until after the time when the defendant's

time to answer would have expired but for the stipulation, should be denied.

A party procuring a stipulation or an order extending the time to answer or demur, waives all objections to the form of the complaint, unless the right to make a motion relating thereto is reserved in the stipulation or order.

APPEAL by the defendant, Sarah E. McCarthy, from an order of the Supreme Court, made at the Saratoga Special Term and entered in the office of the clerk of the county of Essex on the 23d day of July, 1903, denying the defendant's motion to strike out certain portions of the complaint as scandalous and redundant and to require the plaintiff to separately state and number her causes of action.

The time for the defendant to answer, except for the stipulation extending such time, expired prior to the time when this motion was made. The motion papers herein were served personally on the attorneys for the plaintiff, and at the same time the defendant procured of the plaintiff's attorneys a stipulation extending her time to answer the complaint without reserving the right to make this or any motion relating to the form of the complaint.

Fred W. Dudley, for the appellant.

Edward T. Stokes, for the respondent.

CHASE, J.:

The courts have quite uniformly held that where a party procures a stipulation or an order extending his time to answer or demur he waives all objections to the form of the complaint unless the right to make a motion relating thereto is reserved in such stipulation or order.

Thus, in *Brooks* v. *Hanchett* (36 Hun, 70), where a motion was made for an order requiring the plaintiff to separate and number the several causes of action set forth in his complaint, and for an order directing that the complaint be made more definite and certain, an order was made at the Special Term requiring the plaintiff to separately state and number the several causes of action set forth in his complaint, the court at General Term reversed such order and said: "It appears that the defendant procured extensions of time to answer or demur, both by stipulation of the plaintiff and the order of the county judge and in procuring the stipulation and order

he did not reserve the right to move to correct the complaint. This was a waiver of all objections to the complaint and a bar to the motion. It involves an admission that the complaint is in form to require an answer."

In *Smith* v. *Pfister* (39 Hun, 147), where a motion was made for an order directing that an amended complaint be set aside and held for naught for the reason that it was insufficient as an amended complaint, the court say: "The defendants had waived their right to make the motion by procuring an order extending their time to answer the amended complaint or demur, without reserving the right to move to set it aside. The procuring of extension of time implies that the complaint is sufficient to require an answer or demurrer."

In *Garrison* v. *Carr* (34 How. Pr. 187), where a motion was made to set aside a complaint as inconsistent with the summons, the court say: "But I think that the defendant must be held to have accepted the complaint as it is and to have waived the objection of its non-conformity to the summons. He has obtained an extension of time to answer and this is an admission that the complaint was to be answered."

In *Bowman* v. *Sheldon* (5 Sandf. 657) the court say: "An order enlarging the time to answer should be regarded as an admission by the party obtaining it that he means to answer the complaint as it stands and should, therefore, operate as a bar to a future motion for its alteration, unless by the terms of the order the right to make the motion is expressly given."

For many years there has been a formal rule of practice (General Rules of Practice, rule 22) prescribing the time within which certain motions relating to the pleadings must be made. Such rule is a bar to at least a part of the defendant's motion. The rule stated in the decisions quoted has not been limited to the motions enumerated in said Supreme Court rule 22. It is a rule which results from the general principles relating to waiver, and as the necessary consequence and effect of a defendant obtaining a stipulation or order extending his time to plead, without suggesting that the complaint is not in such form as he is entitled to have it before serving his answer or demurrer and reserving in such stipulation or order the right to make a motion to have the complaint corrected.

In *Southworth* v. *Bennett* (58 N. Y 659) and *Stokes* v. *Behrenes*

(23 Misc. Rep. 442), called to our attention by the appellant, it is held that the time when a party should be put to his election as to which of two inconsistent causes of action or defenses he will rely upon, is in the discretion of the court.

These decisions do not affect the respondent's contention in this case. The order should be affirmed, with ten dollars costs and disbursements.

Order unanimously affirmed, with ten dollars costs and disbursements.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. DUTILH-SMITH, McMILLAN & COMPANY, Relator, v. NATHAN L. MILLER, as Comptroller of the State of New York, Respondent.

Corporate tax — time when such tax is payable — a foreign corporation, having its principal office in the State of New York, which simply sells, under an agency, the goods of another corporation through agents acting in foreign countries, is not liable to tax.

Section 181 of the Tax Law (Laws of 1896, chap. 908, as amd. by Laws of 1901, chap. 558), which imposes a license fee upon corporations and provides, "The tax imposed by this section on a corporation not heretofore subject to its provisions shall be paid on the first day of December, nineteen hundred and one, to be computed upon the basis of the amount of capital stock employed by it within the State during the year preceding such date, unless on such date such corporation shall not have employed capital within the State for a period of thirteen months, in which case it shall be paid within the time otherwise provided by this section," should be construed to mean that if the corporation has not done business for twelve months, it shall pay the license fee at the time otherwise prescribed in the section, to wit, between twelve and thirteen months after it shall have commenced to employ capital within the State of New York.

A corporation organized under the laws of the State of Delaware, whose sole business consists in selling, under a contract of agency, the goods of another corporation in foreign countries, through agencies in such foreign countries, the orders for the goods and the purchase price being sent directly to its principal, and which maintains its principal office in the city of New York, using it simply as a headquarters for the transmission of orders to its agents and for the receipt of reports from such agents, does not employ any capital in the State of New York.

CERTIORARI issued out of the Supreme Court and attested on the 28th day of July, 1903, directed to Nathan L. Miller, as Comptroller of the State of New York, commanding him to certify and return to the office of the clerk of the county of Albany all and singular his proceedings had in imposing a license fee upon the relator under section 181 of the Tax Law, and a franchise tax under section 182 of the Tax Law, for the year ending October 31, 1901.

The relator is a corporation organized under the laws of the State of Delaware. Its authorized capital stock is $500,000, of which $100,000 was issued for cash, and $400,000 for the good will of the firm of Dutilh-Smith, McMillan & Co. of Philadelphia. On or about September 15, 1901, the relator moved its principal office from Philadelphia to New York city, where it has since been maintained. In 1902 the Comptroller stated an account for license fee against the relator of $625, and for franchise tax for the year ending October 31, 1901, $750. Upon an application for readjustment thereof, the license fee was reduced to $312.50 and the tax to $375. This determination the relator seeks to have reviewed upon this writ of certiorari.

Theodore L. Frothingham, for the relator.

John Cunneen, *Attorney-General*, and *William H. Wood*, for the respondent.

SMITH, J.:

By section 181 of the Tax Law (Laws of 1896, chap. 908, as amd. by Laws of 1901, chap. 558) the license fee is to be computed upon the basis of the capital stock employed by the corporation within this State during the first year of carrying on its business. The section then reads: "The tax imposed by this section on a corporation not heretofore subject to its provisions shall be paid on the first day of December, nineteen hundred and one, to be computed upon the basis of the amount of capital stock employed by it within the State during the year preceding such date, unless on such date such corporation shall not have employed capital within the State for a period of thirteen months, in which case it shall be paid within the time otherwise provided by this section." While this provision of the statute is not clear, the only interpretation possible which will give effect to its provisions is, that if the corporation has not done business for

twelve months it shall pay the license fee at the time otherwise prescribed in the section, to wit, between twelve and thirteen months after it shall have commenced to employ capital within the State. Inasmuch as the company did not come into the State until September 15, 1901, it had not at the time this tax was stated in the Comptroller's account employed capital within this State for a period of twelve months, and was, therefore, not then subject to the payment of the license fee. The readjustment of this tax, however, was upon October 6, 1902. At that time the relator had been employing capital within the State for twelve months, and was properly subject to the payment of this license fee upon the actual capital employed within the State during said twelve months, and the first question presented for our determination is as to what part of the capital of the relator was employed within the State of New York.

From the evidence presented to the Comptroller it appeared that this corporation was simply acting as the agent of the American Car and Foundry Company. By the contract of its agency the relator was not permitted to sell any goods in the United States. Its business was solely in making contracts in foreign countries. These contracts were made through the agencies in those foreign countries, and the orders were sent direct to the American Car and Foundry Company as was also the money due upon the contracts. The compensation of the relator was two and one-half per cent upon the contract prices paid. There was in addition to this some construction work, which was sublet, however, but which was entirely carried on in England, and outside of the United States and the State of New York. In fact, the New York office of this corporation appears to have been simply the headquarters in which were received the reports from these various agents, and from which were given to them their instructions.

We are unable to find any capital of the relator employed within the State of New York. While the good will of a corporation has been held at times to be a part of the capital employed within this State, it has never been so held where substantially all the business of the corporation was carried on in foreign countries. Its business was that of selling goods exclusively in foreign countries, and there, it seems to me its capital, including its good will, was employed

The mere fact that the headquarters were in New York, from which place directions were given and at which place orders were received, does not change the nature of the business from one essentially foreign to one transacted within the State. (See *People ex rel. Chicago Junction, etc., Co. v. Roberts*, 154 N. Y. 1.)

The decision of the Comptroller should, therefore, be reversed with fifty dollars costs and disbursements to the relator.

All concurred.

Determination of the Comptroller reversed, with fifty dollars costs and disbursements to the relator.

TOWN OF PALATINE and Others, Respondents, v. THE CANAJOHARIE WATER SUPPLY COMPANY and JOSEPH M. JOHNSON, Appellants.

Party — an action for an injury to a town bridge should be brought in the name of the town — the commissioners of highway should not be joined as parties plaintiffs — demurrer which sufficiently alleges a misjoinder of parties plaintiff.

Under chapter 7 of the Laws of 1889, relating to the bridge across the Mohawk river connecting the village of Canajoharie in the town of Canajoharie with the village of Palatine Bridge in the town of Palatine, which provides, "hereafter the said free bridge and the approaches thereto shall be under the control and direction of the commissioners of highways of the towns of Canajoharie and Palatine, * * * and the costs and expenses of maintaining said bridge and approaches and keeping the same in repair shall be borne equally by said towns of Canajoharie and Palatine," an action to restrain the alleged unlawful laying of water pipes upon such bridge and to recover damages, alleged to have resulted therefrom, should be brought in the names of the two towns and it is improper to join with them, as parties plaintiff, the highway commissioners of said towns.

The following demurrer served in such an action, "The defendants demur to the complaint of the plaintiffs herein and allege as the ground of their demurrer that there is a misjoinder of parties plaintiff. That neither Henry C. Miller, as Commissioner of Highways of the Town of Canajoharie, Montgomery County, N. Y., John H. Van Wie, Adam A. Saltsman or Charles Bauder as Commissioners of Highways of the Town of Palatine, Montgomery County, N. Y., should have been a party plaintiff; neither one has any legal capacity to sue," if regarded as a demurrer upon two grounds, viz., *First*, that there is a misjoinder of parties plaintiff; and *second*, that the plaintiffs, who are commissioners of highways, have not legal capacity to sue, should be overruled, as

section 490 of the Code of Civil Procedure provides that a demurrer upon either of these grounds "must point out specifically the particular defect relied upon."

If, however, the demurrer be viewed as stating but one ground of demurrer, viz., that there was a misjoinder of parties plaintiff in that neither of the highway commissioners named should have been a party plaintiff, as neither of them had any legal capacity to sue upon the cause of action stated in the complaint, there would be a sufficient compliance with the provision of the Code requiring the defect relied upon to be pointed out.

SMITH and HOUGHTON, JJ., dissented.

APPEAL by the defendants, The Canajoharie Water Supply Company and another, from an interlocutory judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Montgomery on the 24th day of June, 1903, upon the decision of the court, rendered after a trial at the Fulton Special Term, overruling the defendants' demurrer to the plaintiffs' complaint.

The cause of action stated in the complaint is one to restrain the defendants from unlawfully laying water pipes upon and over a highway bridge across the Mohawk river, which is the boundary line between the towns of Palatine and Canajoharie, and for damages to said bridge and its approaches by reason of laying said pipes thereon. There were joined as plaintiffs each of said towns and the commissioners of highways of such towns. It is alleged in the complaint that "the plaintiffs commissioners are given the control of said bridge and the approaches thereto by virtue of Chapter 7 of the Laws of 1889."

The demurrer interposed is as follows: "The defendants demur to the complaint of the plaintiffs herein and allege as the ground of their demurrer that there is a misjoinder of parties plaintiff. That neither Henry C. Miller, as Commissioner of Highways of the Town of Canajoharie, Montgomery County, N. Y., John H. Van Wie, Adam A. Saltsman or Charles Bauder as Commissioners of Highways of the Town of Palatine, Montgomery County, N. Y., should have been a party plaintiff; neither one has any legal capacity to sue."

From the judgment overruling this demurrer the defendants have appealed.

Andrew J. Nellis, for the appellants.

Henry V. Borst, for the respondents.

CHESTER, J.:

If the demurrer herein is to be regarded as one upon two grounds, viz.: *First*, that there is a misjoinder of parties plaintiff; and *second*, that the plaintiffs who are commissioners of highways have not legal capacity to sue, it is evident that the demurrer was properly overruled, because the Code requires that a demurrer on either of these grounds "must point out specifically the particular defect relied upon" (Code Civ. Proc. § 490), and that has not been done in this demurrer, unless the statement as to the first ground, that neither of the commissioners should have been a party, amounts to a compliance with that requirement.

The appellants insist, however, that there is but one ground of demurrer alleged and that is a misjoinder of parties plaintiff, and that the demurrer specifically points out the particular defect relied upon where it states that neither of the commissioners named should have been a party plaintiff, as neither of them has any legal capacity to sue; that is, as is claimed, no legal capacity to sue for the cause of action stated in this complaint. Viewed in that light it would appear that there has been a sufficient compliance with the provision requiring the defect relied upon to be pointed out to raise the question of a misjoinder of parties plaintiff. The defect is that under the law these commissioners have no right to sue in their names as commissioners for the cause of action stated in the complaint, and, therefore, they should not have been joined with their respective towns as plaintiffs, and that having been so joined there is a misjoinder of parties plaintiff. When the allegation of want of capacity is regarded as a reason for the misjoinder and not as a separate ground of demurrer, the pleading as a whole is sufficiently specific, we think, in pointing out the particular defect relied upon to require us to consider the question of misjoinder on its merits.

It is alleged in the complaint that the plaintiffs commissioners are given control of the bridge in question and the approaches thereto by virtue of chapter 7 of the Laws of 1889. That act was an amendment to section 3 of chapter 280 of the Laws of 1867, and the last-named act was one to amend chapter 143 of the Laws of 1859, entitled "An act for a free bridge over the Mohawk river." The amendment of 1889 provided that "hereafter the said free bridge and the approaches thereto shall be under the

control and direction of the commissioners of highways of the towns of Canajoharie and Palatine, * * * and the costs and expenses of maintaining said bridge and approaches and keeping the same in repair shall be borne equally by said towns of Canajoharie and Palatine." Prior to that amendment, as a reference to the legislation referred to shows, the bridge had been in control of the trustees of the villages of Canajoharie and Palatine Bridge. The former village is at one end of the bridge in the town of Canajoharie, and the latter village is at the other end of the bridge in the town of Palatine. Prior to the amendment, as well as afterwards, the expenses of maintaining the bridge and approaches and keeping the same in repair were borne by the towns of Palatine and Canajoharie. It is clear that the only purpose and effect of the amendment of 1889 was to take the control of the bridge in question from the trustees of the two villages respectively and to place such control in the commissioners of highways of the respective towns of Canajoharie and Palatine. The bridge formed a part of the highway between these two towns.

Among the general powers of highway commissioners in towns under the Highway Law (Laws of 1890, chap. 568) is to "have the care and superintendence of the highways and bridges therein." (§ 4.) That law also provides that "when such bridges are constructed over streams or other waters forming the boundary line of towns, either in the same or adjoining counties, such towns shall be jointly liable to pay such expenses." (§ 130, as amd. by Laws of 1902, chap. 321.) The words "control and direction" in the amendment of 1889 to the local law have, I think, no broader significance with reference to the duties and powers of the commissioners of highways of the two towns in question than have the words "care and superintendence" in section 4 of the Highway Law with reference to the duties and powers of commissioners of highways in the towns of the State. In either case the commissioners of highways are officers or agents of the towns, charged with the duties and clothed with the power specified under these laws, and the commissioners who are plaintiffs were vested by the amendment of 1889 to the local law only with like powers and duties as were conferred by the general law upon commissioners of highways with respect to highways and bridges in towns. The bridge in question

was maintained by the two towns at their joint expense, and the plaintiff commissioners, as officers of these towns respectively, were simply their agents under the law in the control and direction thereof, and any suit which they were required to bring with relation to an enroachment upon the bridge should, therefore, be brought in the same way as any suit in relation to highways under the care and superintendence of commissioners of highways.

A town is now a municipal corporation (Town Law [Laws of 1890, chap. 569], § 2), and the Town Law (§ 182) provides that actions or special proceedings for the benefit of a town, including an action to recover damages for injury to the property or rights of a town, shall be in the name of the town. More than this, the Highway Law in section 15, in relation to actions for injuries to highways, provides that "the commissioners of highways may bring an action in the name of the town against any person or corporation to sustain the rights of the public in and to any highway in the town, and to enforce the performance of any duty enjoined upon any person or corporation in relation thereto."

Regardless of what the law formerly was which permitted commissioners of highways to prosecute certain actions in their own name of office, the cause of action stated in this complaint can, as the law now stands, only be prosecuted by the commissioners of highways in the name of the towns of which they are officers. That an action to recover damages for the destruction of a bridge was properly brought in the name of the town was decided by this court in *Town of Fort Covington* v. *U. S. & C. R. R. Co.* (8 App. Div. 223) and which decision was affirmed in the Court of Appeals (156 N. Y. 702).

The judgment overruling the demurrer should be reversed, with costs, and the demurrer sustained, with costs.

All concurred, except SMITH and HOUGHTON, JJ., dissenting.

Interlocutory judgment reversed, with costs, and the demurrer sustained, with costs.

GEORGE A. KENT, an Abutting Owner on Court Street and a Taxpayer of the City of Binghamton, Respondent, *v.* THE COMMON COUNCIL OF THE CITY OF BINGHAMTON and THE BINGHAMTON RAILROAD COMPANY, Appellants.

An unsigned opinion, stating after a discussion of the facts and the law "Judgment is granted accordingly, with costs," is not a decision — if otherwise sufficient, the statement as to costs is defective.

An unsigned opinion written by a justice who presided at the trial of an action at the Special Term, which after a lengthy discussion of the facts and law concludes as follows: "If I am correct in the conclusions reached, the plaintiff is entitled to the relief demanded in his complaint and to a permanent injunction restraining the municipality from enforcing the tax levied. Judgment is granted accordingly, with costs," cannot take the place of the formal decision required by section 1022 of the Code of Civil Procedure, and in the absence of such a decision, the judgment rendered in the action will be reversed and the case remitted to the Special Term for a decision.

Semble, that the case being one in which costs were in the discretion of the court, even if the opinion could be regarded as a decision, it did not comply with the provision of the Code which directs that "in an action where the costs are in the discretion of the court, the decision or report must award or deny costs, and if it awards costs, it must designate the party to whom the costs to be taxed are awarded."

APPEAL by the defendants, The Common Council of the City of Binghamton and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Broome on the 9th day of April, 1903, upon, as stated in said judgment, the decision of the court, rendered after a trial at the Broome Special Term, restraining the defendants from collecting any part of the expense of paving a certain portion of Court street in the city of Binghamton.

C. A. Collin, for the appellants.

D. H. Carver, for the respondent.

CHESTER, J.:

The record on appeal does not show that there has been any decision in this case as required by section 1022 of the Code of Civi Procedure. The attorneys have apparently regarded the unsigned

opinion of the learned justice at Special Term as a decision, and upon that alone the clerk has entered the judgment which has been appealed from. The opinion, after a lengthy discussion of the facts and law, concludes as follows: "If I am correct in the conclusions reached, the plaintiff is entitled to the relief demanded in his complaint and to a permanent injunction restraining the municipality from enforcing the tax levied. Judgment is granted accord ingly, with costs."

This is an action where the costs are in the discretion of the court, and the section of the Code alluded to provides that "in an action where the costs are in the discretion of the court, the decision or report must award or deny costs, and if it awards costs, it must designate the party to whom the costs to be taxed are awarded." Even if the opinion could properly be regarded as a decision, the clause quoted therefrom, which is all there is touching the question of costs, shows that there has been no compliance with this provision of the Code and that the court has not designated the party to whom the costs to be taxed are awarded. We think, however, that the opinion cannot stand in the place of the formal decision required by the Code. It is apparent it was not intended as such, and if it was intended by the justice as a "short decision" he would undoubtedly have signed it and he would have inserted therein proper directions concerning the entry of the judgment and in relation to costs. As it is, there has been no compliance with the section referred to as it stood at the time of the trial, which was before the amendment thereto made by chapter 85 of the Laws of 1903, and which section required the decision to "state separately the facts found and the conclusions of law," or to state "concisely the grounds upon which the issues have been decided," and in either case to "direct the judgment to be entered thereon." (See Laws of 1895, chap. 946.) The judgment, therefore, has been entered without any decision upon which to base it. The case has been tried, but so far as this record shows has not been decided. It is true that the justice has expressed the opinion that the plaintiff is entitled to the relief demanded in the complaint, but on that opinion a formal decision should have been prepared as required by the Code as a foundation for the judgment. The section of the Code cited requires that the decision when filed shall form part of

the judgment roll, and the stipulation annexed to the record is, that it contains a true copy of the judgment roll. No decision being found therein, we may assume that none has been filed and that the judgment, so far as this record shows, has been wrongly entered.

There are numerous authorities to the effect that in a situation like this the appeal is not in a condition to be heard upon the merits. (*Hall* v. *Beston*, 13 App. Div. 116; *McManus* v. *Palmer*, Id. 443; *Burnham* v. *Denike*, 54 id. 132; *Osborne* v. *Heyward*, 40 id. 78; *Reynolds* v. *Ætna Life Insurance Co.*, 6 id. 254; *Shaffer* v. *Martin*, 20 id. 304; *Wood* v. *Lary*, 124 N. Y. 83.)

No motion having been made to vacate the judgment for want of a decision, we must reverse it and will do so, without costs to either party, and remit the case to the Special Term for decision.

All concurred.

Judgment reversed, without costs, and case remitted to Special Term for decision.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. GEORGE A. VAN NORDER, Relator, v. THE SEWER, WATER AND STREET COMMISSION OF THE VILLAGE OF SARATOGA SPRINGS, N. Y., and DOUGLASS C. MORIARTA, President of Said Commission, Respondents.

Legislative power over highways and streets — an act making it unlawful to drive on a street soliciting patronage is constitutional — what constitutes a violation thereof — a hackman in Saratoga Springs must be licensed — the power to grant licenses is discretionary — conditions may be imposed.

The Legislature has the supreme control of streets and public highways and has the right to regulate and restrict their use.

Section 40 of chapter 536 of the Laws of 1902, relative to the village of Saratoga Springs, which makes it unlawful for any hackman to "permit any horse or vehicle to stand in any public street of said village for hire, or to walk or drive through the streets soliciting patronage," is constitutional.

A hackman has no legal right to carry on business in the streets of such village, and where he accepts a license conditioned that he will not "permit any horse or vehicle to stand in any public street of said village for hire, or to walk or drive through the streets soliciting patronage," such license may be revoked if he violates the condition.

Semble, that the person or board authorized to issue the license is clothed with a discretion to grant or revoke it.

Evidence that about two o'clock on a September afternoon a hackman drove slowly up and down one of the principal streets in the village looking to the right and left; that he continued to do so until five minutes after three, when a man on the sidewalk beckoned to him and that he took him into his surrey and drove away with him; that he returned with such person in about ten minutes and received fifty cents fare from him, and that from that time until about half-past five o'clock he continued to drive slowly and continuously up and down such street looking on either side as he drove, is sufficient to justify a finding that the hackman was engaged in soliciting patronage upon the streets in violation of the statutes and of his license.

CERTIORARI issued out of the Supreme Court and attested on the 8th day of October, 1903, directed to The Sewer, Water and Street Commission of the Village of Saratoga Springs, N. Y., and another, commanding them to certify and return to the office of the clerk of the county of Saratoga all and singular their proceedings had in revoking a license issued to the relator, authorizing him to engage in the business of a hackman and of carrying passengers for hire in said village.

T. F. Hamilton, for the relator.

Joseph P. Brennan, for the respondents.

CHESTER, J.:

The relator was a licensed hackman in the village of Saratoga Springs. By section 40 of chapter 506 of the Laws of 1902 it is made unlawful for any hackman to "permit any horse or vehicle to stand in any public street of said village for hire, or to walk or drive through the streets soliciting patronage." The relator was charged before the president of the sewer, water and street commission of the village with a violation of this law and with a violation of the condition on which his license was issued. After a hearing the charges were sustained and the relator's license revoked. The purpose of this writ is to review that determination.

It is urged by the relator that the law under which he was licensed and pursuant to which his license was revoked is counter to section 6 of article 1 of the State Constitution, the claim being that he has been deprived of his property without due process of law. It seems to me a complete answer to this contention is that the relator has no legal right to conduct his business in a public street,

except he does so under a lawful license authorizing him so to do. The law in question does not prohibit the relator from engaging in the occupation of a hackman, but simply lays down salutary rules prohibiting his soliciting patronage as such hackman in the public streets. The Legislature has the supreme control of the streets and public highways and has the right to regulate and restrict their use. (*People* v. *Kerr*, 27 N. Y. 188, 192.)

In *Cohen* v. *Mayor, etc., of New York* (113 N. Y. 537), which was a case involving the question of the right of a municipality to permit the storage of a wagon in a public street, Judge PECKHAM, writing for the court, said: "The primary use of a highway is for the purpose of permitting the passing and repassing of the public, and it is entitled to the unobstructed and uninterrupted use of the entire width of the highway for that purpose. * * * It is no answer to the charge of nuisance that, even with the obstruction in the highway, there is still room for two or more wagons to pass, nor that the obstruction itself is not a fixture. If it be permanently, or even habitually in the highway, it is a nuisance. The highway may be a convenient place for the owner of carriages to keep them in, but the law, looking to the convenience of the greater number, prohibits any such use of the public streets. The old cases said the king's highway is not to be used as a stable yard, and a party cannot eke out the inconvenience of his own premises by taking in the public highway."

The law in question here was clearly one for the protection of the public and to secure to them the uninterrupted use of the streets of the village, free from interference by hackmen, either in obstructing the streets with their unemployed vehicles or by their importunities or solicitations for patronage.

When the Legislature gave to the municipality the right to license hackmen under certain restrictions and conditions, the act was a lawful exercise of legislative power. In order to enjoy the benefits of the license so authorized the licensee is bound to comply with the lawful restrictions imposed as a condition of issuing the license. The license to this relator was issued by the commission, as the authorized agents of the village of Saratoga Springs, and was accepted by the relator subject to all the laws of the State, the ordinances of the commission and of the village regulating the use

of the streets, and contained a proviso that a violation of any of its conditions would result in its forfeiture.

One of such ordinances provided for two hack stands, which were maintained by the village pursuant to the ordinance, where licensed vehicles might stand while waiting for employment, and one of the conditions fully set forth in the license was that the relator should not "permit any horse or vehicle to stand in any public street of said village for hire, or to walk or drive through the streets soliciting patronage." He was charged with violating that condition. If that charge was true it was a breach of the contract under which he received his license and under the terms thereof it was forfeited. So also if it was true there has been no interference with any of the rights of the relator, constitutional or otherwise, except such as he expressly agreed might be interfered with in case he violated any of the conditions under which his license was issued to him. It is urged, however, that the relator had an absolute right to a license upon his paying the stipulated charge therefor, and that the commission had no discretion in the matter of issuing it, and that, therefore, they had no right to impose the condition named in the statute, or to revoke the license for its violation, but that is evidently not so, as this commission is given the power under the law to establish such ordinances, by-laws and regulations as they shall deem proper and reasonable to regulate, restrain and license all hackmen engaged in carrying passengers for hire; to fix the amount to be paid for a license in each case and to prohibit any hackman from carrying on any such business in the village without having previously obtained a license (Laws of 1902, chap. 506, § 9, subd. 23, as amd. by Laws of 1903, chap. 192) and to issue such license. (Id. § 41.)

Under similar statutes it has been held that the person or board authorized to issue the license was clothed with a discretion to grant or refuse it. (*People ex rel. Schwab* v. *Grant*, 126 N. Y. 473; *Matter of Armstrong* v. *Murphy*, 65 App. Div. 126; *People ex rel. Houston* v. *Mayor of New York*, 7 How. Pr. 81.) The case of *People ex rel. Osterhout* v. *Perry* (13 Barb. 206) is cited in support of the contrary doctrine, but, as has been said, that case "is deemed quite doubtful as authority, in view of the later cases upon the subject." (*People ex rel. Cumisky* v. *Wurster*, 14 App. Div. 556.)

I think, therefore, that the relator had no property right which gave him the privilege to carry on business as a hackman in the streets of the village of Saratoga Springs without a license, and having accepted a license upon a condition that he should not solicit patronage in the public streets, a violation of that condition properly resulted in a forfeiture of his license in accordance with its terms.

Upon the question as to whether or not he violated the condition there was presented a clear question of fact for the determination of the president of the commission. It was shown that the relator on the 4th day of September, 1903, from about two o'clock to about three-five o'clock in the afternoon, with two horses hitched to a surrey, drove up and down Broadway in the village of Saratoga Springs, going slowly, looking to the right and to the left as he drove; that at five minutes after three, while he was thus driving, a man on the sidewalk beckoned to him and he turned into the curb, took the man into his surrey and drove away with him; that he returned with such person in about ten minutes and received fifty cents fare from him, and that from that time until five-thirty o'clock he again continued to drive slowly and continuously up and down Broadway, looking on either side as he drove. The place where he drove was in the heart of the village, passing in front of the leading hotels. The act of soliciting patronage may be evidenced quite as well by conduct as by word of mouth. The mere facts that he was driving during so long a period upon a busy thoroughfare, looking along as he went, to the sidewalks and the hotels, with his licensed surrey, and taking up a passenger who he found upon the street, was quite sufficient evidence to justify the conclusion on the part of the president of the commission that he was engaged in soliciting patronage in violation of the statute and of his license. We think, therefore, we should not disturb the conclusion of the president of the commission as being against the evidence or the weight of evidence.

The determination should be confirmed, without costs.

Determination unanimously confirmed, without costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE NORTH AMERICAN COMPANY, Relator, v. NATHAN L. MILLER, as Comptroller of the State of New York, Respondent.

Tax on a foreign corporation — under what circumstances a foreign investment company is subject thereto — proof as to property on hand being capital and as to its form of investment.

An investment company incorporated under the laws of the State of New Jersey had its principal office in Jersey City, and also maintained an office in the city of New York where its principal business was transacted.

Its business consisted in purchasing, holding and selling the stocks and bonds of corporations organized under the laws of States other than the State of New York and doing business outside of the State of New York. All of the business relating to the investment or reinvestment in said stocks and bonds was supervised, if not actually done, at the New York office.

During the years ending respectively October 31, 1900, and October 31, 1901, the corporation, besides furniture in an office for which it paid over $2,000 rent, and to the employees in which it paid each year in the aggregate wages in excess of $23,000, carried large monthly bank balances in the State of New York, and held in the State of New York a large amount of financial securities. It also held a considerable amount of bills and accounts receivable in the State of New York.

The treasurer of the corporation testified that it had no surplus during the years in question, and that it had not earned enough to pay a dividend.

Held, that the State Comptroller was justified in imposing a franchise tax and license fee upon the corporation for the years in question;

That, in view of the testimony of the treasurer of the corporation, the items above enumerated could not have been surplus or income, and must, therefore, have been capital employed in the State of New York;

That while there was testimony that all of the capital of the corporation was invested in the stocks and bonds of other foreign corporations, this was a statement of a mere conclusion, the correctness of which the Comptroller was to determine.

CERTIORARI issued out of the Supreme Court and attested on the 15th day of August, 1902, directed to Nathan L. Miller, as Comptroller of the State of New York, commanding him to certify and return to the office of the clerk of the county of Albany all and singular his proceedings had in relation to the revision and readjustment of the license fee and franchise tax imposed upon the relator for the years ending October 31, 1900, and October 31, 1901.

The relator is a foreign corporation incorporated under the laws

of the State of New Jersey as an investment company, and has its principal office in the city of Jersey City, and also maintains an office in the city of New York, where its principal business is transacted. Its authorized capital during the year ending October 31, 1900, was $50,000,000, of which about $40,000,000 was issued, and during the year ending October 31, 1901, was $12,000,000, of which $11,836,700 was issued, the reduction being made by scaling down the value of assets consisting of good will, and each stockholder who had 100 shares receiving instead 30 shares. This proceeding is brought to review the determination of the Comptroller upon a revision and readjustment of an account for taxes and for a license against the relator, imposed under the provisions of sections 181 and 182 of the Tax Law (Laws of 1896, chap. 908, as amd. by Laws of 1901, chap. 558).

Alfred Jaretzki, for the relator.

John Cunneen, Attorney-General, and *William H. Wood*, for the respondent.

CHESTER, J.:

If, during the years in question, the relator, in carrying on its business, employed any portion of its capital stock within this State there is no question but that it was liable to that extent for the license fee and tax imposed upon it. Its business was that of an investment company, and consisted in purchasing, holding and selling the stocks and bonds of corporations organized under the laws of States other than the State of New York, and doing business outside of this State. All of the business relating to the investment or reinvestment in said stocks and bonds was supervised, if not actually done, at the New York office. In conducting that business it had and employed within this State, during the years in question, considerable amounts of money on deposit, as well as stocks, bonds and other securities, and these moneys and securities, together with a small item of furniture in the New York office, have been made the basis of the license and tax imposed upon the relator. The capital employed within the State is represented by the money and securities and other property which it has here and

which it employs in its business, and formed a proper basis of taxation. (*People ex rel. Union Trust Co.* v. *Coleman*, 126 N. Y. 433; *People ex rel. Seth Thomas Clock Co.* v. *Wemple*, 133 id. 323.)

The relator insists, however, that substantially the same question as is presented in this case for determination was before this court upon a proceeding to review a like tax imposed by the Comptroller upon the relator for a former year and that his action in so imposing it was reversed by this court upon the authority of *People ex rel. Chicago Junction, etc., Co.* v. *Roberts* (154 N. Y. 1). (*People ex rel. North American Co.* v. *Roberts*, 32 App. Div. 631.)

The *Chicago Junction* case, in the Court of Appeals, upon the authority of which the former case was reversed, was decided by a divided court, three of the judges having dissented from the prevailing opinions, and can hardly be regarded as a controlling authority for a case so unlike it as the one here. There the purpose for which the corporation was organized was to invest its capital in the stock and bonds of an Illinois corporation and its whole capital was so invested, and the entire business transacted in this State was to receive and distribute the dividends or income derived from such investment. It was held that, although the corporation was doing business in this State, no part of its capital was employed here.

So, too, the former case in this court (32 App. Div. 631) was decided on the facts then here and which led the court to the conclusion that none of the capital of the relator was employed in this State during the year for which the tax was imposed, but here the record shows that substantially all its business is done in this State; that in the year ending October 31, 1900, the relator had an office in New York city for which it paid an annual rent of $2,227.74, having furniture therein of the value of $1,500; that it paid salaries to certain officers, clerks and stenographers employed in the city of New York, amounting to $23,495.12; that its average monthly bank balances carried in the State was $107,564.60; that its average amounts of stocks, bonds, loans on call or other financial securities held in the State against other corporations, joint stock companies, associations or individuals was $91,750.47, and that the average amount of bills and accounts receivable in New York was $16,666.66.

The record also shows that in the year ending October 31, 1901, it paid $2,316.72 rentals in New York; that its office furniture

there was of the value of $1,000; that it paid $23,998.47 salaries to persons employed by it in this State; that its average monthly bank balances carried in this State was $491,963.83; that its average amount of stocks, bonds, loans on call or other financial securities held in this State against other corporations, joint stock companies, associations or individuals was $787,597.20, and that the average amount of its bills and accounts receivable was $22,866.66.

The treasurer of the relator testified that it had no surplus during the years in question. Therefore, the items above mentioned could not have been surplus. His testimony, also, was that up to the date of the imposition of the tax the company had not earned enough to pay a dividend. That being so, these items were not income. They must, therefore, have been capital and capital employed within the State. It is true that there was also testimony that all of the relator's capital was invested in the stocks and bonds of other foreign corporations, but that was the statement of a mere conclusion which, with the facts above recited before him, required the Comptroller to determine whether or not the conclusion was correct.

The Comptroller decided that it was not, and imposed a tax for the year ending October 31, 1900, on a basis of $200,814, and for the year ending October 31, 1901, on a basis of $1,281,833.49, making a total tax for the two years of $2,223.97, and imposed a license fee on a basis of $1,281,833.49, amounting to $1,602.29.

We think under the facts before him he was within the law when he imposed such tax and license fee. The determination should, therefore, be confirmed, with fifty dollars costs and disbursements.

Determination of the Comptroller unanimously confirmed, with fifty dollars costs and disbursements.

In the Matter of Proving the Last Will and Testament of JOHN SPEAR, Deceased.

SARAH SPEAR, Appellant; WILLIAM H. SPEAR and Others, Respondents.

Will — a provision for a widow "in lieu of dower and of all rights statutory and otherwise," construed — it does not give to the widow, by implication, in case it is refused, her distributive share of the estate.

The will of a testator provided as follows: "*First.* After all my lawful debts are paid and discharged I give, devise and bequeath to my wife Sarah Spear, the sum of six hundred dollars ($600), this sum is given to and to be accepted and received by her, in lieu of dower and of all rights statutory and otherwise on her part against my estate."

It then, after several bequests to the testator's children and grandchildren, bequeathed the residuary estate, both real and personal, to the testator's three sons. Following the residuary clause was a direction that the executors sell all the real and personal property and "with the proceeds thereof to pay my debts and funeral expenses and all the above legacies."

Held, that if the widow accepted the bequest of $600, she would not be entitled to her statutory rights under section 2718 of the Code of Civil Procedure, but would be entitled to enforce any debt existing in her favor against the estate;

That if she rejected the bequest of $600, she would be entitled to dower and to her statutory rights under section 2718 of the Code of Civil Procedure and to enforce any debt existing in her favor against the testator's estate, but would not be entitled to a distributive share of the testator's personal estate the same as if he had died intestate.

APPEAL by Sarah Spear from so much of a decree of the Surrogate's Court of Washington county, entered in said Surrogate's Court on the 21st day of May, 1903, as construes the provisions in the will of John Spear, deceased, made for the benefit of said Sarah Spear.

The will in question contained the following provision:

"*First.* After all my lawful debts are paid and discharged I give, devise and bequeath to my wife Sarah Spear, the sum of six hundred dollars ($600) this sum is given to and to be accepted and received by her, in lieu of dower and of all rights statutory and otherwise on her part against my estate."

The will, after giving several bequests of small amounts to children and grandchildren, contains the following residuary clause:

"*Sixth.* All the rest, residue and remainder of my estate, both real and personal, I give, devise and bequeath to my three sons, William Spear, Samuel Spear and George Spear, to be divided between them share and share alike."

It then contains a clause directing the executors to sell all the testator's real estate and personal property and "with the proceeds thereof to pay my debts and funeral expenses and all the above legacies."

The surrogate decided that the true construction and legal effect of the 1st paragraph of the will was that "in case the said widow accepts the said bequest of $600 she thereby cuts off her right of dower, her statutory rights under section 2713 of the Code of Civil Procedure and any debt that may exist in her favor against the estate; and that in the event of her failure or refusal to accept said bequest, she will then be entitled to dower, her statutory rights under section 2713 of the Code of Civil Procedure, and the payment of any debt due her against the estate of said testator." From so much of the decree as contains such construction, the widow appeals.

T. W. McArthur, for the appellant.

James C. Rogers, for the respondents.

CHESTER, J.:

The appellant urges that the language of this will is effective to give the widow an implied alternative legacy in addition to the ordinary provision in lieu of dower, which entitles her in case she rejects the provision for her benefit in the will, to the same distributive share in his personal estate as if he had died intestate. The language in giving the legacy is that it is "to be accepted and received by her, in lieu of dower and of all rights statutory and otherwise on her part against my estate." She relies in support of her contention upon *Matter of Vowers* (113 N. Y. 569). That was a case where a legacy by implication was upheld. In the will under consideration there the provision for the benefit of the testator's wife was followed by this clause: "This provision to be accepted by my wife in lieu of her dower right *and distributive share in my estate.* She to make her election whether she accepts this provision

of my will within sixty days from the time of proving the same." The will there contained a clause giving all the residue of the testator's property to his nephew. The widow rejected the provision within the time stated in the will and thereupon claimed that she was entitled, not only to her dower, but to a bequest by implication of a sum equivalent to what would have been her distributive share had the testator died without a will, and the Court of Appeals so held, overruling the construction given to the will by the General Term and the surrogate. That holding was based upon the conclusion that the words of the testator left "no doubt about his intention and can have no other reasonable interpretation," and that a contrary construction required "that the words relating to a distributive share shall have no meaning, and can have none, and must be utterly expunged from the will." It was said by Judge FINCH, who wrote the opinion, that "the question of construction raised by the language of the testator in framing the provision for his wife is of a character so unusual that we can find no precise parallel or precedent in the courts of our own State." With that statement in the opinion the case should not be deemed an authority for extending the doctrine there laid down beyond the precise case there decided.

The real question to be determined is what was the intention of the testator, and that must be found from the will itself and the surrounding circumstances. Here there was no provision that the bequest to the testator's wife was in lieu of a distributive share of his estate and requiring her to make an election, but instead the bequest to her was "in lieu of dower and of all rights statutory and otherwise on her part" against the testator's estate. There was, of course, no intestacy, and in such case the widow had no statutory or any other right to a distributive share of the testator's personal estate. The words employed must be construed in the light of the facts as they exist. Where a will is made, effectually disposing of the testator's personal estate, there is no right under the law, statutory or otherwise, in the widow to have a share of such personal estate under the Statute of Distributions. The testator does not say the bequest is in lieu of "all rights" as in case of intestacy, and there is nothing, as there was in the *Vowers* case, upon which to uphold a legacy by implication.

While we have reached the conclusion on this branch of the case that the decision of the surrogate should be affirmed, we think the decree should not have provided that the acceptance of the bequest would cut off any existing debt in favor of the widow against the estate. It is true that it does not appear in the record that there is any such debt. Nor does it appear that there is not. It may be purely an academic question in the case, but if so it should not have been adjudicated upon by the surrogate. The bequest to the widow follows the language "After all my lawful debts are paid and discharged I give," etc., and in the 7th clause the executors are required with the proceeds of the sale of the testator's property to pay his debts. No exception is made with reference to a debt to his wife, and the intent is clear that a construction which would prevent the collection of a debt in her favor, if she has one, is unwarranted by the language employed in the will.

The decree should be modified by striking out the provision respecting a debt in favor of the wife and as so modified affirmed, without costs.

All concurred.

Decree modified by striking therefrom the provision respecting a debt in favor of the widow and as so modified affirmed, without costs.

OTTO DAVIS, by EMMA DAVIS, his Guardian ad Litem, Respondent, v. THE BROADALBIN KNITTING COMPANY, Appellant.

Under a complaint alleging a cause of action under the Employers' Liability Act, proof cannot be made of a common-law liability.

Where the complaint in an action, brought by an employee against an employer to recover damages for personal injuries sustained by the employee, states a cause of action based wholly upon the Employers' Liability Act (Laws of 1902, chap. 600), the employee cannot recover upon proof of a common-law cause of action, if seasonable objection is made thereto and no amendment of the complaint is asked for or allowed.

APPEAL by the defendant, The Broadalbin Knitting Company, from a judgment of the Supreme Court in favor of the plaintiff,

entered in the office of the clerk of the county of Fulton on the 18th day of February, 1903, upon the verdict of a jury for $1,200, and also from an order entered in said clerk's office on the 13th day of February, 1903, denying the defendant's motion for a new trial made upon the minutes.

Lewis E. Carr and *Edward W. Douglas*, for the appellant.

Henry V. Borst and *Florence J. Sullivan*, for the respondent.

HOUGHTON, J.:

The plaintiff was injured while in the employ of the defendant and brings this action to recover damages.

The complaint alleges the giving of a notice of the time, place and cause of the injuries to the plaintiff, in the manner and within the time provided by the Employers' Liability Act (Laws of 1902, chap. 600), and that defendant was negligent in omitting its duty of seeing that its "ways, works and machinery" were proper and in proper condition. There is a further allegation that the "garnet machine," by which plaintiff was injured, was insufficiently protected and was improper and insufficient for the purposes for which it was used.

The injury occurred in November, 1902, after the Employers' Liability Act became a law, and the complaint must, we think, be construed as stating a cause of action founded upon that act.

The plaintiff failed to prove the cause of action which he alleged.

A garnet machine is one used for picking and cleaning wool, and consists of a series of picking cylinders standing about twenty-two inches from the floor. It was the custom in defendant's mill for an employee to crawl under the machine and lie on his back and clean these cylinders from underneath while they slowly revolved. It was while doing this that the plaintiff's foot was caught between the cylinders and he was injured.

There was no proof that this machine was not in proper repair, or that it was improper or insufficient for the purpose for which it was designed, or that the plaintiff was injured because it was insufficiently protected. There was no obligation on the part of the defendant to guard these cylinders against an employee, the contact with which

could be had only by crawling under the machine. The negligence of the defendant, if there was any negligence at all, consisted in its failure to prescribe a safer mode of cleaning the cylinders, or in failing to warn the plaintiff, who was under fifteen years of age, of the danger in the work, or in permitting an employee of such immature years to engage in such hazardous business. And this was the theory, against defendant's objection that such a cause of action was not alleged in the complaint, upon which the case was tried and submitted to the jury. No amendment of the complaint that it conform to the proof, or that it be amended by appropriate allegations to permit such proofs, was asked for upon the trial. Whether such amendment would have been proper, or whether since the Employers' Liability Act an employee must bring his action for injuries under that act, or whether that act takes away from him his common-law right of action, we do not now decide. It is sufficient for the present case that against the defendant's objection, duly taken, the plaintiff recovered a judgment upon a common-law cause of action when his complaint set forth a cause of action wholly under the statute. His judgment is founded on a cause of action wholly separate and distinct from that alleged in his complaint and cannot be sustained on appeal. (*Southwick* v. *First National Bank of Memphis*, 84 N. Y. 420; *Truesdell* v. *Sarles*, 104 id. 167; *Reed* v. *McConnell*, 133 id. 426.) Irrespective of whether or not an employee still retains his right to bring a common-law action for injuries against his employer notwithstanding the Employers' Liability Act, if he chooses to bring his action under that act his proofs must establish a cause of action thereunder. He cannot plead within the precise terms of the act and then be permitted to prove, if seasonable objection be made, acts of negligence wholly outside his complaint. (*Smith* v. *Lockwood*, 13 Barb. 209; *Woolsey* v. *Trustees of Ellenville*, 69 Hun, 489; *Hoffman* v. *Third Ave. R. R. Co.*, 45 App. Div. 587; *Coyle* v. *Third Ave. R. R. Co.*, 18 Misc. Rep. 9.)

The judgment and order must be reversed and a new trial granted, with costs to the appellant to abide the event.

All concurred.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

JOHN W. D. BARKLEY, Respondent, v. CLINTON BECKWITH, Appellant, Impleaded with RAY B. LEWIS, Defendant.

Partnership — liability of one partner who, after the dissolution of the firm, permits his former copartner to make use of the firm letter heading.

The fact that after the dissolution of a partnership one of the former partners knowingly permits the other partner to use in his correspondence letter heads of the partnership, in which the first-mentioned partner is designated as a member of the partnership, will not charge such first-mentioned partner with liability for goods furnished to the other partner, after the dissolution of the partnership, by a corporation which has never dealt with the partnership.

APPEAL by the defendant, Clinton Beckwith, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Rensselaer on the 16th day of October, 1902, upon the verdict of a jury, and also from an order entered in said clerk's office on the 21st day of October, 1902, denying the said defendant's motion for a new trial made upon the minutes.

Charles D. Thomas, for the appellant.

Warren McConihe and *John B. Holmes*, for the respondent.

HOUGHTON, J.:

The action is to recover the value of certain valves claimed to have been furnished by the plaintiff's assignor, the Mohawk and Hudson Manufacturing Company, to the defendants Lewis and Beckwith as copartners.

The appellant Beckwith had been a partner with Lewis in the installation of a water system at Mount Kisco. During the continuance of that partnership letter heads were printed and used, reading as follows: "R. B. Lewis, Clinton Beckwith. R. B. Lewis & Co., Herkimer, N. Y., General Contractors. Waterworks, Sewers, Dams, Foundations, etc." After the completion of the Mount Kisco contract, Lewis opened an account with plaintiff's assignor and directed that the goods be shipped to him at another place. The first installment was shipped to him individually, and thereafter they were shipped to R. B. Lewis & Co., but it was not shown that Beckwith knew that the goods were so consigned.

The only evidence tending to charge appellant Beckwith as copartner was that he knew that Lewis was using the old stationery in his correspondence and permitted him to do so. The plaintiff's assignor had not dealt with the old partnership, but opened its account after it was in fact closed. The permitting of the use of the stationery was not such an act as estopped the appellant from denying the partnership, or constituted him a partner as to the vendors. Nor was there any other evidence in the case which had that effect. The defendant's motion for a nonsuit should have been granted, and failing to do this, the court should have granted his motion for a new trial.

The judgment should be reversed and a new trial granted, with costs to the appellant to abide the event.

All concurred.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

CHARLES C. ATCHASON, as Administrator, etc., of ELIZABETH F. ATCHASON, Late of Green Island, Albany County, New York, Deceased, Respondent, v. UNITED TRACTION COMPANY, Appellant.

Negligence — duty of an infant, non sui juris, *to exercise care commensurate with its years and intelligence — whether it does so is a question for the jury.*

In an action brought to recover damages resulting from the death of the plaintiff's intestate, a child five and a half years of age, who, during the daytime, was struck and killed by one of the defendant's street cars, it appeared that the child was, for her age, particularly bright, active, alert and intelligent.

The court in its charge left it to the jury to say whether or not the child was *sui juris*, and instructed them, if they found that she was, she was chargeable with her own negligence, but if they found that she was *non sui juris*, then she was not chargeable with her own negligence, but only with the negligence of the person having her in charge.

The defendant requested the court to charge as follows: "that the child, under the circumstances, was required to exercise some care, and if it failed to exercise any care it was guilty of negligence, which negligence was imputable to the plaintiff even though the child should be *non sui juris*." The court declined to charge other than it had already done.

Held, that the ruling was erroneous.

Semble, that an infant, whether he be *sui juris* or *non sui juris*, is not, in law, excused from exercising such care as is commensurate with his years and intelligence in approaching and passing known objects and places of danger (per HOUGHTON, J.);

That when an infant is so young that it has no judgment and is not expected to avoid danger, the only negligence that can be imputed to it is that of the person having it in charge (per HOUGHTON, J.);

That when a child is old enough to have any experience and intelligence, it becomes a question for the jury whether he exercised the degree of care and caution which should be expected from one of his age, experience and intelligence, and if they find that he failed to exercise such degree of care and caution, it is their duty to deny him any redress (per HOUGHTON, J.);

That, under the charge as made and the refusal to charge, the jury might have found that the child was *non sui juris*, and still had enough knowledge and experience to appreciate the danger which threatened her, but was not called upon to exercise such knowledge and experience in any manner, and hence the jury might have been led into holding the defendant responsible even if the child ran heedlessly into the car (per HOUGHTON, J.);

That the refusal to charge as requested was consequently harmful to the defendant and required the reversal of a judgment entered upon a verdict in favor of the plaintiff (per HOUGHTON, J.).

PARKER, P. J., SMITH and CHESTER, JJ., concurred in result.

APPEAL by the defendant, the United Traction Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Albany on the 30th day of December, 1902, upon the verdict of a jury for $1,200, and also from an order entered in said clerk's office on the 30th day of December, 1902, denying the defendant's motion for a new trial made upon the minutes.

Patrick C. Dugan, for the appellant.

Mark Cohn and *John Scanlon*, for the respondent.

HOUGHTON, J.:

The action is for the negligent killing of plaintiff's intestate, a child five and a half years of age.

The claim of the plaintiff was that the defendant's motorman was negligent in failing to observe and to stop his car as the child ran towards the track upon which his car was proceeding, and that the car was being run at an improper rate of speed.

The defendant's contention was that the child unexpectedly ran

from the curb to the track and ran into the fender of the car and so was injured.

In the number of witnesses who testified to the manner in which the accident happened, the defendant had much the advantage. Without, however, passing upon the question as to whether a new trial should have been granted because the verdict was against the weight of evidence, we think the judgment must be reversed because of the refusal of the court to charge one of the requests made by the defendant. The proof was that the child was particularly bright, active, alert and very intelligent for her age. The accident occurred in the daytime and about one o'clock P. M. The court by his charge had left it to the jury to say whether or not she was *sui juris*, and had instructed them if they found she was, she was chargeable with her own negligence, but if they found she was *non sui juris*, then she was not chargeable with her own negligence, but only with the negligence of her parents.

Amongst the defendant's requests to charge was the following: "I ask your honor to charge the jury that the child, under the circumstances, was required to exercise some care, and if it failed to exercise any care it was guilty of negligence, which negligence was imputable to the plaintiff even though the child should be *non sui juris.*" The court declined to charge other than it had concerning the question as to whether the child was *sui juris*, and what its duties were if it was, to which the defendant excepted. Neither by the charge nor in response to the various requests had the court so instructed the jury, and we think its refusal to do so was error for which the judgment must be reversed.

We think it to be the rule that an infant whether he be *sui juris* or *non sui juris* is not in law excused from exercising such care as is commensurate with his years and intelligence in approaching and passing known objects and places of danger. This is distinctly held in *Keller* v. *Haaker* (2 App. Div. 245), in *Weiss* v. *Metropolitan Street Railway Co.* (33 id. 223) and by a concurring memorandum in *Costello* v. *Third Ave. R. R. Co.* (161 N. Y. 324). We might rest the proposition upon the citation of these authorities except for the cases of *Kitchell* v. *Brooklyn Heights R. R. Co.* (6 App. Div. 99); *Penny* v. *Rochester R. Co.* (7 id. 595) and *Hyland* v. *Burns* (10 id. 386), which assume that the only negligence which

can be imputed to a child *non sui juris* is that of the parent or guardian. These authorities make it not improper for us to substantiate the proposition by further citation and reason.

In *O'Mara* v. *Hudson River R. R. Co.* (38 N. Y. 449) the court says: "The old, the lame and the infirm are entitled to the use of the streets, and more care must be exercised toward them by engineers than toward those who have better powers of motion. The young are entitled to the same rights, and cannot be required to exercise as great foresight and vigilance as those of maturer years. More care toward them is required than toward others. In the case of a child but two or three years of age, no knowledge or foresight could be expected."

Stone v. *Dry Dock, etc., R. R. Co.* (115 N. Y. 104, 110) was an action to recover damages for the negligent killing of an infant seven years of age, whom the court below held, as matter of law, to be *sui juris*. In reviewing the case ANDREWS, J., says: "We are inclined to the opinion that in an action for an injury to a child of tender years, based on negligence, who may or may not have been *sui juris* when the injury happened, and the fact is material as bearing upon the question of contributory negligence, the burden is upon the plaintiff to give some evidence that the party injured was not capable, as matter of fact, of exercising judgment and discretion. This rule would seem to be consistent with the principle now well settled in this State, that in an action for a personal injury, based on negligence, freedom from contributory negligence on the part of the party injured is an element of the cause of action. In the present case the only fact before the jury bearing upon the capacity of the child whose death was in question was that she was a girl seven years and three months old. This, we think, did not alone justify an inference that the child was incapable of exercising any degree of care. But, assuming that the child was chargeable with the exercise of some degree of care, we think it should have been left to the jury to determine whether she acted with that degree of prudence which might reasonably be expected, under the circumstances, of a child of her years."

In *Thurber* v. *Harlem B., M. & F. R. R. Co.* (60 N. Y. 335) the court remarks, "By the adult there must be given that care and attention for his own protection that is ordinarily exercised by per-

sons of intelligence and discretion. Of an infant of tender years less discretion is required, and the degree depends on his age and knowledge," and then refers with approval to *Railroad Company* v. *Gladmon* (15 Wall. 408). Turning to that case we find that HUNT, J., says: "Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of three years of age, less caution would be required than of one of seven, and of a child of seven less than of one of twelve or fifteen. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case."

We find the following language in *Dowling* v. *N. Y. C. & H. R. R. R. Co.* (90 N. Y. 671): "But it is well settled that the same degree of care is not required of an infant of tender years which is required of an adult. An infant, to avoid the imputation of negligence, is bound only to exercise that degree of care which can reasonably be expected of one of its age, and in passing upon the question of contributory negligence the age of the infant, with all the other circumstances in the case, is to be considered by the jury."

And finally in *Costello* v. *Third Ave. R. R. Co.* (161 N. Y. 324), PARKER, Ch. J., says: "The presumption that the plaintiff was *non sui juris* was not met by direct evidence, but the plaintiff was a witness, and his testimony, as well as the manner of giving it, gave the jury an opportunity to measure his intelligence, and it was for them to say whether he was in fact *sui juris*, and if they should conclude that he was not, then the further question remained for their consideration whether he exercised that degree of care and caution which should be expected from one of his age, experience and intelligence."

We have been careful to quote the language from the authorities cited because there have crept into many of the reported cases expressions indicating that when an infant is *non sui juris* the only negligence which may be imputed to him is that of his parents or guardian. Where an infant is so young that it has no judgment and is not expected to avoid danger, manifestly the only negligence which can be imputed to it is that of the person having it in charge. But there comes a time in the development of a child when it must have learned some things. Although it may lack judgment to act

with care and circumspection in regard to avoiding danger, yet it may be quite sensible of the necessity of avoiding contact with any objects which experience has taught will inflict harm. Certain children might very early learn to avoid passing vehicles, and that there was great danger in a moving car. When an infant complains of wrongs to himself, the defendant has a right to insist that he should not have been a heedless instrument of his own injury. The negligence of an infant *non sui juris* may very seldom become a matter of law for the court to decide. But where a child is old enough to have any experience and intelligence, it becomes a question for the jury to determine whether he exercised the degree of care and caution which should be expected from one of his age, experience and intelligence. If he had knowledge and experience and failed to exercise any care commensurate with his age and knowledge, it would be the duty of the jury to deny him any redress.

In the present case the question was properly left to the jury to determine whether the infant was *sui juris* or not. Under the refusal of the court to charge, and under the charge as made, the jury might have found that she was *non sui juris* and still had enough knowledge and experience to appreciate the danger, but was not called upon to exercise it in any manner. This might have led the jury into holding the defendant responsible, even if the injury occurred by reason of her running into the side of the car. In any aspect we cannot say that the refusal of the court to charge as requested was not harmful to the defendant. This conclusion leads to a reversal of the judgment and makes it unnecessary to examine the other questions raised by the appellant.

The judgment and order should be reversed, with costs.

All concurred; PARKER, P. J., and SMITH, J., in result; CHESTER, J., concurred in result in memorandum.

CHESTER, J. (concurring):

I cannot agree with Mr. Justice HOUGHTON that it was error to refuse to charge the request pointed out by him, for I think the learned trial justice had correctly and sufficiently charged the jury with respect to the negligence of the child or of her parents if the jury found she was not sufficiently mature to care for herself, and

with respect to the degree of care, if any, which a child of the immature years of the plaintiff's intestate was required to exercise.

I think, however, that the verdict was clearly against the weight of evidence and should have been, for that reason, set aside, and, therefore, I concur in the result reached.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

JOHN BELLEGARDE, Respondent, v. UNION BAG AND PAPER COMPANY, Appellant.

Employers' Liability Act — measure of the liability imposed upon employers by it — a foreign statute re-enacted by the State of New York will be construed as interpreted in the foreign country — injury to a workman from the falling of a derrick, not properly secured by guy ropes.

In an action brought under the Employers' Liability Act (Laws of 1902, chap. 600) to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendant, it appeared that the defendant was engaged in the erection of a building and that the work was in charge of a superintendent who hired and discharged the men and directed their work; that for the purpose of raising large roof timbers the superintendent erected on the floor of the upper story a shears derrick; that the legs of the derrick were planted a few feet back from the face of the building and that it was suspended over the edge of the building at an angle of about forty-five degrees by a guy rope running to the rear; that at the time of the erection of the derrick the superintendent's attention was called to the fact that the derrick should be secured by a guy rope running to the front, but that the superintendent refused to support it in that manner, although it appeared that it was customary and proper to do so; that as the first timber was being lifted by the derrick the superintendent called the plaintiff from his work in another portion of the building and directed him to help haul it in between the legs of the derrick; that while the superintendent and the plaintiff were so engaged the derrick fell over backward, striking the plaintiff and injuring him.

The plaintiff knew nothing as to the manner in which the derrick had been constructed or was supported, and was working with his back to the derrick when it fell upon him.

Held, that the jury were justified in finding that the superintendent was guilty of negligence and that the plaintiff was free from contributory negligence;

That the defendant was consequently liable under the terms of the Employers' Liability Act;

That the effect of the Employers' Liability Act is to take from the employer the defense of common employment where injury results to an employee through the negligence of one whose sole or principal duty is that of superintendence, at least where the negligence related to the place of the performance of the work and the construction of appliances for its prosecution; and it cannot be construed as making an employee a mere licensee to whom the employer owes no duty of exercising reasonable care.

When a statute of a foreign jurisdiction is re-enacted in the State of New York, it should be construed in accordance with the interpretation placed upon it by the courts of the jurisdiction from which it was taken.

APPEAL by the defendant, the Union Bag and Paper Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Saratoga on the 28th day of July, 1903, upon the verdict of a jury for $1,000, and also from an order entered in said clerk's office on the 12th day of August, 1903, denying the defendant's motion for a new trial made upon the minutes.

Edgar T. Brackett, for the appellant.

T. F. Hamilton, for the respondent.

HOUGHTON, J.:

The plaintiff was an employee of the defendant, engaged in the erection of a building. The work was in charge of a superintendent who hired and discharged the men and directed their work. For the purpose of hoisting large roof timbers the superintendent erected on the floor of the upper story a "shear derrick." The legs of the derrick were back a few feet from the face of the building, and it was suspended over its edge at an angle of about forty-five degrees by a guy rope running to the rear. At the time of its erection the superintendent's attention was called to the fact that a guy rope to the front was necessary, or at least proper, but he declined to support it in that manner. As the first timber was lifted to the level of the flooring, the superintendent called the plaintiff from his work in another portion of the building, and directed him to help haul it in between the legs of the derrick. As this was being done by the plaintiff in conjunction with the superintendent, the derrick was pulled up to a perpendicular position and over backwards, striking the plaintiff and injuring him. The derrick was a

proper one and the defendant had furnished sufficient ropes to guy it properly.

The alleged negligence consisted in the failure of the superintendent to guy the derrick in front, and it is manifest that if this had been done the accident could not have happened.

It was conceded on the trial that the action would not lie except under the provisions of the Employers' Liability Act (Laws of 1902, chap. 600), under which the complaint was framed. And this was true, for the structure was not a permanent one, but was one to be transferred from place to place as occasion required, and its erection and use were mere details of the work in which plaintiff was engaged, and the negligence of the superintendent, if any, notwithstanding he was exercising supervision, was that of a co-employee. The defendant having supplied a proper derrick with proper ropes to secure it, and a competent foreman to direct its erection, had done all that at common law an employer was bound to do; and any negligence by the superintendent in the use of these materials and appliances thus furnished came within the details of the work instead of supervision, and was the negligence of a fellow-workman and one of the risks which the plaintiff assumed in accepting the employment and in doing the work which he was directed to do. (*Loughlin* v. *State of New York*, 105 N. Y. 159; *Hogan* v. *Smith*, 125 id. 774; *Cullen* v. *Norton*, 126 id. 1; *Bagley* v. *Consolidated Gas Co.*, 5 App. Div. 432.)

The plaintiff insists that the object of the Employers' Liability Act is to change the common law in this regard and to relieve the employee from this risk, and to make the employer liable for such negligent acts of his superintendent.

The defendant, on the other hand, urges that the effect of the language of the act in the 2d subdivision of section 1, providing that the right of compensation and remedies of the employee shall be the same as though he were not an employee, is to put him in the category of a mere licensee upon the employer's premises, to whom there is not due the duty of reasonable care, and that his only redress is for injuries arising from unreasonable hazards or concealed dangers.

If the act accomplishes what the plaintiff claims it does, the judgment must be affirmed, for there was evidence that the customary

and proper way to secure such a derrick was to guy it in front, and the jury were justified in finding that the superintendent was guilty of negligence in failing to do so. The plaintiff knew nothing as to the support of the structure or the manner in which it was erected, and was working with his back to the derrick as it came to a perpendicular position and fell over upon him, obeying the directions of the superintendent, and the jury properly found that he was not guilty of contributory negligence.

So far as we have been able to ascertain, the phase of the statute under consideration has not been passed upon by any of the appellate courts of our State, and we are without the aid of such adjudicated cases. The statute, so far as it affects the question involved, reads as follows:

"SECTION 1. Where, after this act takes effect, personal injury is caused to an employee, who is himself in the exercise of due care and diligence at the time:

"1 By reason of any defect in the condition of the ways, works or machinery connected with or used in the business of the employer, which arose from or had not been discovered or remedied owing to the negligence of the employer, or of any person in the service of the employer and entrusted by him with the duty of seeing that the ways, works or machinery were in proper condition;

"2 By reason of the negligence of any person in the service of the employer entrusted with and exercising superintendence whose sole or principal duty is that of superintendence, or in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer; the employee * * * shall have the same right of compensation and remedies against the employer as if the employee had not been an employee of nor in the service of the employer nor engaged in his work."

In 1880 the English Parliament enacted an Employers' Liability Act which was limited to expire on December 31, 1887, but which has been continued in force by various statutes until the present time (see 43 & 44 Vict. chap. 42; 3 Edw. 7, chap. 40), and in turn, in 1887, the State of Massachusetts enacted a substantial copy, and in 1902 the Legislature passed our own act, practically the same as those acts in all its essential features.

The language of the English and Massachusetts acts is almost identical with the provisions of our statute quoted above. The States of Indiana, Alabama and Colorado also enacted, prior to our own, statutes containing all or many of the provisions of the original acts. The courts of England and Massachusetts, by numerous decisions, have interpreted the language of the act and defined its scope and effect, and the interpretations put upon it by those courts before our statute was passed, even if not binding upon us, are entitled to great weight as throwing light upon the intention of our own Legislature in enacting the law. It is a general rule that when a foreign statute is re-enacted it is to be understood as it has been interpreted by the courts of the country from which it was taken. (*President, etc., of Waterford & Whitehall Turnpike* v. *People*, 9 Barb. 161; *Ryalls* v. *Mechanics' Mills*, 150 Mass. 191; *Commonwealth* v. *Hartnett*, 3 Gray, 450.) It is fair to infer that the Legislature intended that the words used should have the meaning given to them by the courts, for if it were intended to exclude any known construction of the statute, the legal presumption is that its terms would be so changed as to effect that intention. (*Beebee* v. *Griffing*, 14 N. Y. 243.)

Turning to the English and Massachusetts cases, we find that in *Griffiths* v. *Dudley* (9 Q. B. Div. 357, 362, decided in 1882) the court says: "The Employers' Liability Act was passed to obviate the injustice to workmen, that employers should escape liability where persons having superintendence and control in the employment were guilty of negligence causing injury to the workmen. The employer was, before the passing of the act, clearly liable where he himself was guilty of negligence. It is also clear now that, for the negligence of a fellow-workman not coming within any of the classes of persons specified in the act, the employer is not liable. But before the passing of the act, *Wilson* v. *Merry* (L. R. 1 H. L., Sc. 326) had decided that, where the injury was caused through the negligence of a superior person in the employment, the workman could recover no damages from their common employer. The object of the act was to get rid of the inference arising from the fact of common employment with respect to injuries caused by any persons belonging to the specified classes."

By the practice of Massachusetts the declaration of the plaintiff is

permitted to contain common-law counts as well as counts under the statute, and the employee can elect upon which he will rely.

In *Coffee* v. *New York, etc., Railroad* (155 Mass. 22, decided in 1891) ALLEN, J., referring to the Employers' Liability Act, says: "The right of an employee to maintain an action under this statute is not identical with his right to maintain an action at common law. It may be greater, or it may be less. The statute provides that in certain specified cases 'such employee shall have the same right of compensation and remedies against the employer as if the employee had not been an employee of, nor in the service of, the employer, nor engaged in its work.' * * * In other words, in the cases specified the defense of common employment with the person through whose negligence the injury was caused is taken away."

As sharply illustrating the change in the law of Massachusetts effected by the statute and recognized by the courts two cases may be cited. *Kenney* v. *Shaw* (133 Mass. 501) was a case where a workman engaged in blasting at a quarry was injured by attempting to drill into a hole at the direction of the superintendent, who had negligently failed to inform him that it contained unexploded blasting material, or had failed to ascertain whether the blast had been defectively fired, and it was held that the plaintiff could not recover, as the negligence was that of a coservant. In *Malcolm* v. *Fuller* (152 Mass. 160) an employee was injured under practically the same circumstances, but he brought his action under the Employers' Liability Act, and the master was held liable because of the negligence of the superintendent in improperly directing the cleaning of the blasting hole, the court holding that the object of the statute was to make the employer liable for, and to prevent the employee from assuming, the risks of the negligence of the superintendent.

It will be observed that before the enactment of the Employers' Liability Act in Massachusetts the courts of that State held in line with our own with respect to the negligence of superintendents, and that *Kenney* v. *Shaw* (*supra*) is in accord with the case of *Cullen* v. *Norton* (126 N. Y. 1), in which the employer was held not liable for the negligence of the superintendent of his quarry in not cleaning out a defective blast and in putting an employee at work

near it, although he knew it had not exploded, and which subsequently did explode, killing the workman.

The extent to which the courts of Massachusetts had gone prior to the enactment of our statute in interpreting the Employers' Liability Act, in so far as it related to the liability of the employer for the negligent acts of his superintendent, is illustrated by the cases of *Davis* v. *N. Y., N. H., etc., Railroad*, 159 Mass. 532 (holding him liable for the failure of his superintendent to warn a track repairer of an approaching train); *Jarvis* v. *Coes Wrench Co.*, 177 id. 170 (failure to warn inexperienced workman of danger); *O'Brien* v. *Nute-Hallett Co.*, Id. 422 (failure to inspect grain bin), and *Prendible* v. *Connecticut River Mfg. Co.*, 160 id. 131 (failure to inspect temporary staging or to prevent it being overloaded). These cases are not cited with approval or disapproval so far as the specific acts of negligence decided by them are concerned, but only as illustrating the interpretation of the act by the courts of that State prior to the enactment of our own law. In determining what are acts of negligence, and for what acts of the superintendent the employer is liable under the act, our courts may or may not follow the Massachusetts decisions and that should be determined only as the several questions shall arise. So far as the interpretation of the statute under consideration is concerned, the decisions of that State, as well as of the English courts, however, commend themselves to us and accord with our own views.

We do not think the language of the act has the effect of making an employee a mere licensee upon the employer's premises, or that it was the intent of the Legislature to put him in a class of persons to whom the employer owed no duty of exercising reasonable care. The title of the act is "An act to *extend* and regulate the liability of employers to make compensation for personal injuries suffered by employees." It would be doing violence to the avowed intention of the act to so interpret it that the rights of the employee should be taken away rather than extended. At the time of the passage of the act it was the unquestioned law that it was the duty of the employer to provide a reasonably safe place for his employee to work, and exercise a reasonable degree of care in providing him with suitable machinery and appliances and in keeping the same in a proper state of repair, as well as to employ reasonably competent

coservants. He still owes those duties to his employee and the statute has not relieved him from this performance. As an offset to these obligations it was also the law that the employer was not responsible for injuries resulting from the negligence of a coemployee. This exemption he still enjoys with respect to the negligence of an ordinary coemployee. Notwithstanding the act the negligence of such a coemployee is one of the risks assumed, and if an accident occurs by reason of the negligence of such an one the employer is still relieved from liability. While ordinarily the superintendent represented the master, and while there were many duties he could not delegate, there remained a well-defined rule that when an employer had provided a proper place, machinery, tools and appliances, and a competent superintendent, he was not responsible for the negligent manner in which the superintendent used them or directed his servants to use them, because in that regard the superintendent was a coemployee, notwithstanding his position of superintendence. A fair illustration of this exemption from liability for the negligent acts of superintendents or foremen are the cases of *Cullen* v. *Norton* (126 N. Y. 1); *Schulz* v. *Rohe* (149 id. 132); *Kimmer* v. *Weber* (151 id. 422), and *Perry* v. *Rogers* (157 id. 251).

We think the object was, and the effect of subdivision 2 of section 1 of the Employers' Liability Act is, to take from the employer this defense of common employment where the injury results to an employee through the negligence of one whose sole or principal duty is that of superintendence. At least, this is so in the case at bar where the negligence related to the place of performance of the work and the construction of appliances for its prosecution. The superintendent of defendant was guilty of negligence in not properly guying the derrick after his attention had been called to the insufficiency of its support. The defense that the negligence was that of a coemployee was not available to the defendant, and the judgment must be affirmed.

Judgment and order unanimously affirmed, with costs.

CLARISSA WEATHERWAX CONKLING, Respondent, v. JOHN T. WEATHERWAX and Others, Defendants, Impleaded with HANNAH M. HIDLEY, Appellant, and EMILY A. TOMPKINS, Respondent.

Legacy, charged on real property — in an action to enforce the lien the non-payment of the legacy must be proved — declarations of the devisee do not bind his mortgagee — proof of demand of payment does not establish non-payment — an allegation of non-payment is necessary, although payment is an affirmative defense — when proof of non-payment is essential.

A legatee whose legacy is, by the terms of the will, made a lien upon real property devised thereunder, must, in an action brought against the devisee's successors in title and the holder of a mortgage executed by the devisee, in order to establish the lien of the legacy and to have the land sold in satisfaction thereof, prove as a part of her substantive case that the legacy is a subsisting lien and remains unpaid.

This is so, whether the action is brought under section 1819 of the Code of Civil Procedure or is the ordinary one in equity.

Declarations of the devisee, to the effect that the legacy had not been paid, are competent against the devisee himself and his representatives, but are not competent as against the devisee's mortgagee.

Mere proof of demand of payment is not proof of actual non-payment.

In ordinary actions at law for money, while a breach must be alleged, payment is an affirmative defense which must be pleaded and proved. This rule, however, does not relieve the plaintiff from proof of non-payment, where the failure to pay is an essential element of the right of recovery.

SMITH, J., dissented.

APPEAL by the defendant, Hannah M. Hidley, from a judgment of the Supreme Court in favor of the plaintiff, and the defendant Emily A. Tompkins, entered in the office of the clerk of the county of Rensselaer on the 28th day of April, 1903, upon the decision of the court, rendered after a trial at the Rensselaer Special Term, adjudging the lien of certain legacies of the respondents to be superior to the liens of the other parties to the action upon real property devised by the will of Henry Weatherwax, deceased.

Robert E. Whalen, for the appellant.

Henry D. Merchant, for the respondent Conkling.

Abel Merchant, Jr., for the respondent Tompkins.

HOUGHTON, J.:

The Court of Appeals in its decision of this case (173 N. Y. 43) has eliminated all questions arising therein except the one growing out of the second trial, as to whether it was necessary for the plaintiff to prove that her legacy remained unpaid, and if that burden was upon her whether she proved that fact by competent evidence.

By the will of Henry Weatherwax, deceased, the legacies to plaintiff and to her sister, Emily A. Tompkins, respondent herein, were made a lien upon the farm devised to Charles Weatherwax, who is now deceased. During his lifetime he mortgaged the premises to appellant Hidley. The lien of this mortgage is subordinate to that of the legacies, the payment of which is sought to be enforced. The action is in equity to establish the lien of the legacies and to obtain a decree of sale of the land for their satisfaction.

We think it was incumbent on the plaintiff to prove as a part of her substantive cause of action that her legacy was a subsisting lien and remained unpaid. If the action be deemed one under section 1819 of the Code of Civil Procedure, this is clearly so, for that section provides the action can be maintained only after demand and refusal of payment. If the action be considered an ordinary one in equity, the rule is the same. The plaintiff's position is not different in principle from that of a creditor seeking to charge heirs and devisees to the extent of the property received by them with the debts of their ancestor or testator. In such a case the plaintiff must aver and prove all the facts which make them liable under the statute, including lapse of time, non-payment and lack of assets, as well as receipt of property. (*Selover* v. *Coe*, 63 N. Y. 438; *Brater* v. *Hopper*, 77 Hun, 244.) In ordinary actions at law for money, while breach must be alleged, payment is an affirmative defense which must be pleaded and proved; but this rule does not relieve the plaintiff from proof of non-payment where failure to pay is an essential element to the right of recovery. (*Lent* v. *New York & Mass. R. Co.*, 130 N. Y. 504.) In an action against the guarantor of a mortgage it is incumbent on the plaintiff not only to aver but to prove that the mortgage guaranteed has not been paid. (*Schlesinger* v. *Hexter*, 2 J. & S. 499.) The distinction in the rule

as to proof of non-payment in equitable actions to enforce a lien and in ordinary actions for recovery of money, is shown by the fact that in an action for the foreclosure of a mortgage given as collateral to a bond, non-payment upon the bond must be proved, while in an action on the bond alone this is unnecessary. (*Coulter* v. *Bower*, 11 Daly, 203; *Davies* v. *New York Concert Co.*, 41 Hun, 492.)

In the present case the plaintiff seeks to enforce a collateral which the testator provided for the payment of her claim. The right to resort to the collateral depends upon whether there remains anything due her on her legacy. She is not suing the devisee because he became liable to pay her legacy by accepting the devise, nor is she seeking to enforce payment from his representative, for his representative, as such, is not a party to the action.

Although the plaintiff now asserts that she was not obliged to prove non-payment, yet on the trial she evidently recognized that this burden was upon her, for she sought to prove the fact by declarations of the devisee to the effect that the legacies had not been paid. While such declarations would have been competent against the devisee himself and would be competent against his representatives, were they made parties to the action, they were mere hearsay as against the devisee's mortgagee, this appellant, and were improperly received as against her. The declarations of an assignor of a mortgage made while he was the owner are inadmissible against his assignee to defeat his title or establish equities in favor of the mortgagor. (*Merkle* v. *Beidleman*, 165 N. Y. 21.) Such declarations must be equally inadmissible to establish the existence of a lien prior to that of his mortgagee or to enlarge its amount.

If the plaintiff has a lien existing and prior to that of the mortgage of the appellant, she must establish it by common-law evidence aside from such declarations. The non-payment of the legacy being a fact incumbent upon the plaintiff to prove, evidence upon that subject was material, and appellant's objection to such declarations as against herself was well taken. Mere proof of demand of payment was no proof of actual non-payment. There being no other evidence of non-payment in the case other than these inadmissible declarations, it follows that the judgment must be reversed and a new trial granted, with costs to the appellant to abide the event.

The judgment being reversed, the order appealed from becomes inoperative, and the appeal therein should be dismissed, without costs.

All concurred, except SMITH, J., dissenting, and CHESTER, J., not voting.

Judgment reversed and new trial granted, with costs to appellant to abide event.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. FORT GEORGE REALTY COMPANY, Relator, v. NATHAN L. MILLER, as Comptroller of State of New York, Respondent.

Tax — a domestic corporation which uses its capital in buying New York real estate employs it within that State — it should be taxed for the part of the year during which its capital has been so employed.

Where a domestic corporation organized for the purpose of acquiring, holding and selling real estate in the city of New York, uses all the capital stock issued by it in payment for unimproved real estate in the city of New York and for part of the proceeds of a mortgage upon such real estate, such use of the capital stock constitutes an employment thereof within the State of New York, within the meaning of the Tax Law (Laws of 1896, chap. 908, as amd. by Laws of 1901, chap. 558), and renders the corporation liable to a franchise tax.

A corporation subject to a franchise tax, which has been in existence for but five and a half months of the year for which the tax is assessed, should not be required to pay the tax for the full year, but only for eleven twenty-fourths of that time.

CERTIORARI issued out of the Supreme Court and attested on the 30th day of June, 1903, directed to Nathan L. Miller, as Comptroller of the State of New York, commanding him to certify and return to the office of the clerk of the county of Albany all and singular his proceedings had in assessing the relator for a franchise tax for the year ending October 31, 1902, upon its capital employed within the State during that year, under section 182 of the Tax Law.

Theodore M. Taft, for the relator.

John Cunneen, *Attorney-General*, and *William H. Wood*, for the respondent.

CHESTER, J.:

The relator is a domestic corporation organized for the purpose of acquiring, holding and selling real estate in the city of New York.

It was incorporated and commenced to do business about May 14, 1902. It has not paid or declared any dividends. It has a capital of $100,000, of which 994 shares of the par value of $99,400 have been issued. The amount issued was all used in payment of the purchase price of certain unimproved real estate in that city and for part of the proceeds of a mortgage upon such real estate. If that was not an employment of its capital stock within this State, within the meaning of section 182 of the Tax Law (Laws of 1896, chap. 908, as amd. by Laws of 1901, chap. 558), which would subject it to taxation under that law, the relator is enjoying all the benefits of corporate existence, and is permitted to exercise its corporate franchises and carry on the very business for which it was incorporated without the payment of any franchise tax. The mere statement of the proposition, it seems to me, carries its own answer.

The relator relies upon *People ex rel. Niagara River Hydraulic Co.* v. *Roberts* (30 App. Div. 180; affd., 157 N. Y. 676) in support of its contention that it employed no capital within the State. That was a case where the relator there, as appears by its act of incorporation, was formed for "hydraulic and manufacturing purposes" (Laws of 1832, chap. 116, § 1), and was by its charter made "capable of purchasing, holding, leasing and conveying any estate, real and personal, for the use of the said corporation." Its entire capital stock was issued in payment of the purchase price of a certain island in Niagara river which was unimproved swamp land and unproductive, except that about forty-five dollars was received annually for the grass crop. The court held, on the authority of *People ex rel. Singer Mfg. Co.* v. *Wemple* (150 N. Y. 46), that although its capital was invested here, such capital was not "employed within this State" within the meaning of the statute, and, therefore, that it was not liable to the franchise tax. In the *Singer* case Judge BARTLETT, who wrote the opinion of the court, said: "We decide this case on its peculiar facts, and are not to be understood as in any way changing the rule laid down in *People ex rel. Seth Thomas Clock Co.* v. *Wemple* (133 N. Y. 323), that the capital stock of a foreign corporation employed in this State is represented by the actual value of its property, whether in money or goods or other tangible things."

So also the capital stock of a domestic corporation means the

property of the corporation contributed by its shareholders or otherwise obtained by it to the extent required by its charter. (*Williams* v. *Western Union Telegraph Co.*, 93 N. Y. 162, 168; *Burrall* v *Bushwick Railroad Co.*, 75 id. 211.)

The capital stock of the relator, so far as issued, represented as it is by the property it purchased with that stock, in which purchase it was used in carrying out one of the purposes of the relator's corporate existence, was clearly employed by it in this State, and cases such as that of *Niagara River Hydraulic Co.* (*supra*) and other kindred cases, where the capital exempted from taxation was not necessary to or used for the conduct of the business for which the corporations were organized, but actually withdrawn from such business and otherwise invested, should not serve to exempt from taxation a corporation such as the relator, which comes within the express terms of the statute imposing the tax.

The relator also urges that the Comptroller has made an excessive valuation of its capital stock. He assessed it at a valuation of $99,400. He had before him the sworn appraisal of the treasurer and the secretary of the relator fixing its actual cash value at that amount, so that his assessment is not without ample evidence to support it.

The relator, however, had been in existence and exercising its corporate franchises only five and one-half months of the year for which it was taxed. The tax was laid for the entire year. It should have been apportioned upon the time it had exercised its corporate franchises. (*People ex rel. Mutual Trust Co.* v. *Miller*, 177 N. Y. 51.) The tax as laid, based upon a valuation of $99,400, at one and a half mills on the dollar for the entire year amounted to $149.10. For five and one-half months at that rate it would be $68.34, and it should be reduced to that amount.

Determination of the Comptroller modified by reducing the tax to sixty-eight dollars and thirty-four cents, and as so modified confirmed, with fifty dollars costs and disbursements to the relator.

All concurred.

Determination modified by reducing the tax to sixty-eight dollars and thirty-four cents, and as so modified confirmed, with fifty dollars costs and disbursements to the relator.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HANS REES' SONS, Relator, v. NATHAN L. MILLER, as Comptroller of the State of New York, Respondent.

Tax — assessment of the capital employed by a domestic corporation within the State of New York, how made.

A domestic corporation was organized October 10, 1901, with a capital stock of $500,000. Five shares of its capital stock, of the par value of $100 each, were then subscribed for and sold. No more stock was sold nor business done by the corporation until June 2, 1902, when the corporation purchased a tannery and other property, and issued all the remainder of its capital stock in payment for the same.

The chief business of the corporation was tanning and selling leather, and its tannery and a large part of its property was situated in North Carolina. It also operated a tannery in Virginia. Its office, however, and the place where it conducted its business was in New York city, and it manufactured some leather there.

During the last five months of the fiscal year ending October 31, 1902, its gross assets amounted to $850,848.36, and its liabilities amounted to $350,000. Of its gross assets $273,552.32 were employed in the State of New York. This item did not include certain bills receivable which were due for leather made at tanneries outside of the State of New York and sold to parties residing without the State of New York, and which had never been within the State.

Held, that the bills receivable did not constitute capital employed within the State of New York;

That as it appeared that during the first seven months of the fiscal year ending October 31, 1902, namely, until June 2, 1902, the only capital of the corporation was $500, none of which was employed in the corporation's business, it should be assumed that only five-twelfths of the gross assets were carried by the corporation during the entire fiscal year;

That the franchise tax levied on the corporation for the year 1902 should be determined in the following manner: The total liabilities should be deducted from the gross assets, leaving $500,848.36 as the actual value of its capital stock, it appearing that the corporation had not declared any dividend and that there had been no sales of its stock; that the gross assets employed in the State of New York being .3216 of the entire amount of the gross assets, that proportion of the gross assets. viz., of $500,848.36, would give the value of so much of the capital stock as was employed in the State of New York, to wit, the sum of $160,911.11; that as the latter sum was actually employed only five months of the year, five-twelfths of that sum, to wit, $67,056.60, was the sum upon which the tax should be computed;

That the corporation was not entitled to have deducted from its gross assets of $850,848.36, its total liabilities of $350,000, and to have deducted from the

resulting net assets of $500,348.36 the amount of its capital employed outside the State of New York, viz., $561,394.71, which would leave no assets or capital whatever to be taxed within the State of New York.

CERTIORARI issued out of the Supreme Court and attested on the 29th day of August, 1903, directed to Nathan L. Miller, as Comptroller of the State of New York, requiring him to certify and return to the office of the clerk of the county of Albany all and singular his proceedings had in assessing a tax against the relator for the year ending October 31, 1902, under chapter 908 of the Laws of 1896 and acts amendatory thereof.

Louis H. Porter, for the relator.

John Cunneen, *Attorney-General*, and *William H. Wood*, for the respondent.

PARKER, P. J.:

The relator is a domestic corporation with a capital stock of $500,000. It was organized October 10, 1901, and five shares of its stock of $100 each were then subscribed for and sold. No more stock was sold, nor business done by said corporation until June 2, 1902, when the corporation purchased a tannery and other property from one Rees, and issued all the remainder of its stock to pay for the same. From that time forth it has been actually engaged in business. Its chief business is tanning and selling leather, and its tannery and a large part of its property is situated in North Carolina. It runs another small tannery in Virginia. Its office, however, and the place where it conducts its business is in New York city, and it also manufactures some leather there.

It appears from the record before us that on October 31, 1902, its gross assets amounted to $850,348.36 and its liabilities amounted to $350,000. Of its gross assets $273,552.32 were employed in this State. This item does not include certain bills receivable, amounting to $15,401.33, which were due for leather made at tanneries out of the State and sold to parties residing out of the State, and which had never been within this State.

No dividend has ever been made by the company, nor have any sales of its stock been made during the year.

The Comptroller, after the annual report of the company was

filed, made an assessment under sections 182 and 190 of the Tax Law (Laws of 1896, chap. 908, as amd. by Laws of 1901, chap. 558), for the year ending October 31, 1902, appraising the value of its capital stock employed within this State at $172,500, and fixed the amount of the tax at $258.75. The company asked for a rehearing, and after evidence was taken, the Comptroller revised the assessment and fixed the appraised value of the capital stock employed in this State at $102,500 and the tax thereon at $153.75.

The relator claims that no tax whatever should have been assessed against it; but that if it is liable to pay any, the Comptroller has fixed it at much too high an amount.

The case comes here upon a certiorari to review such decision of the Comptroller.

Several assignments of error are presented by the relator. *First.* The Comptroller claimed that the item of $15,401.33, viz., bills receivable for merchandise sold out of the State, and which never came within the State, were nevertheless capital employed within this State, and estimated the tax upon that basis.

I am of the opinion that the decision of the Comptroller in that respect was erroneous. Although the contract of sale may have been made at their office in this State, the property itself never was in this State, nor does anything representing it come within this State until the purchase price is paid and received in this State. It seems to me that such property is no more employed in this State than is the tannery itself located in North Carolina. The fact that a bill is made out against the purchaser, and possibly filed and entered in a book in the office of the company at New York city, does not bring the capital, or the assets represented by such bill, into this State. In this particular I think the assessment should be corrected.

Second. It is claimed that from the time of the organization of the company in October, 1901, until June 2, 1902, it possessed no capital, except the $500 derived from the sale of the five shares of stock needed to effect its organization, *and employed none*, in this State, nor anywhere else; and that in estimating the amount of capital stock employed in this State as a basis for the tax the average amount used during the entire fiscal year, only, should be taken.

That is, that the tax being an annual one, the capital stock appraised should be apportioned throughout the entire year.

It is conceded that the company had no property, save the $500, and did no business during the first seven months of the year. That during the last five months it had the full sum of $850,348.36 as its gross assets, and that $273,552.32 were employed within this State; and within the principle laid down in *People ex rel. Brooklyn Rapid Transit Co.* v. *Morgan* (57 App. Div. 335; affd., 168 N. Y. 672) I am of the opinion that the relator's claim is a correct one. In that view the estimate should assume that five-twelfths only of the assets above given were carried by the company through the entire year.

The further claim is made by the relator that, in ascertaining the amount of capital stock employed in this State, there should be first deducted from the gross amount of assets employed by the company, viz., $850,348.36, the total liabilities, viz., $350,000. which would leave net assets to the amount of $500,348.36, and that there should then be deducted therefrom the amount of its assets or capital employed *without* the State, viz., $561,394.71, in order to ascertain the amount of capital employed within this State.

Manifestly, since the debts exceed the assets employed in this State, such method would leave no assets or capital whatever to be taxed within this State.

In my opinion such a method would not meet the requirement of the statute. It results in charging against the assets employed in this State *the whole* indebtedness of the company. And this is claimed to be the correct method on the theory that the amount of the company's indebtedness should be deducted from the amount of its taxable property in the place of its domicile and where the tax is sought to be enforced. And the principle of the rule held in *People ex rel. Thurber, Whyland Co.* v. *Barker* (141 N. Y. 118) is invoked to sustain this claim.

In that case the court was dealing with the subject of direct taxation upon a non-resident company's personal property. In this case no taxation upon the property in question is intended. A tax is to be levied upon the company's franchise, and the statute prescribes a method by which the amount of such tax shall be ascertained. In a case where *no* dividends whatever have been paid, and where no

sales of stock have been made, the direction is to appraise the value of the capital stock employed within this State and levy a tax of one and one-half mills thereon. (§§ 182, 190, as amd. *supra.*)

The method of fixing the value of the capital stock in these cases has been frequently pointed out. (*People ex rel. Wiebusch & Hilger Co.* v. *Roberts*, 19 App. Div. 574; affd., 154 N. Y. 101.) From the value of all its assets, deduct its liabilities, and add to the remainder the value of its good will, unless, as in this case, it has already been included in the value of its assets, and such proportion of that sum as is employed in this State is the sum on which the tax is to be levied. Evidently that sum represents the value of its capital stock employed in this State and upon which the statute (§ 182, as amd., *supra*) directs that the tax of one and one-half mills on the dollar shall be levied.

Applying such rule to this case, the total assets or property used by the corporation was $850,348.36, the total liabilities were $350,000, leaving the net assets, or the actual value of all its property, at $500,348.36; and this being a case where there were no dividends and no sales of its capital stock, it represents the actual *value* of its capital stock. It appears from the record that the proportion of the gross assets which was employed in this State was .3216 of the whole amount, and, hence, that proportion of the actual value of its whole capital stock, viz., of $500,348.36, will give the value of so much thereof as is employed in this State, viz., the sum of $160,911.91.

But this amount was actually employed only five months of the year, and inasmuch as only such sum should form the basis of taxation under section 182 (*supra*) as represents the amount employed through the whole year, only five-twelfths of that sum, viz., $67,056.60, is the sum upon which the tax in this case should be computed. One and one-half mills upon $67,056.60 gives a tax of $100.58, and such, I conclude, should have been the tax which the Comptroller should have assessed in this case.

All concurred.

Determination of the Comptroller modified as per opinion, and as so modified confirmed with fifty dollars costs and disbursements to the relator.

The People of the State of New York ex rel. Marquis L. Keyes, Relator, v. Nathan L. Miller, as Comptroller of the State of New York, Respondent.

Redemption from a State tax sale — "actual occupancy" of Adirondack land used as a fish and game preserve — when not such as to require service of notice to redeem.

The Adirondack League Club, in 1890, purchased 9,000 acres of land in the Adirondack mountains, and since then has used the tract as a forest, fish and game preserve. Included in the tract was a lot of 570 acres. Trails were cut through the forest across such lot and a boat landing was built upon the shore of a lake that was partly in the lot. It was also possible, although the fact did not distinctly appear, that notices, warning all persons from trespassing on the 570-acre lot and that it was used as a private park, were posted upon the lot. This lot was used and cared for in the same manner as the rest of the tract.

Held, that the club was not in the "actual occupancy" of the 570-acre lot within the meaning of section 134 of the Tax Law, which requires the service of a notice to redeem from a State tax sale to be served upon the actual occupant of the premises sold.

Smith and Chester, JJ., dissented.

Certiorari issued out of the Supreme Court and attested on the 25th day of July, 1903, directed to Nathan L. Miller, as Comptroller of the State of New York, commanding him to certify and return to the office of the clerk of the county of Albany all and singular his proceedings had in the matter of redeeming certain lands sold by him for taxes.

Griffin & Ostrander, for the relator.

John Cunneen, *Attorney-General*, and *William H. Wood*, for the respondent.

Parker, P. J.:

The relator purchased at a tax sale by the State Comptroller in 1900, lot 6, township 6, Moose river tract, county of Herkimer, being a tract of land consisting of 570 acres. It was assessed and sold for taxes as non-resident lands. The time for redemption by the owner expired in December, 1901, and a conveyance was executed by the Comptroller to the relator on March 6, 1903. On May 23, 1903, the application of the Adirondack League Club to redeem such

lands as an occupant thereof under the provisions of section 137 of the Tax Law (Laws of 1896, chap. 908) was granted by the Comptroller. No notice to redeem, as provided for by section 134 of such law (as amd. by Laws of 1902, chap. 171), had been served by the relator. He claims, however, that the said lands were not occupied, within the provisions of such section 134, by the said club, or by any one whomsoever, and he has sued out this certiorari to review the decision of the Comptroller upon that question.

There are no facts claimed by either party which are disputed. The single question presented to us is, whether the club, in December, 1901, had such an actual possession of the tract so sold and conveyed to the relator as is required by section 134 of the act aforesaid.

The Adirondack League Club owned some 90,000 acres of land as a forest preserve, and the tract in question was a part thereof, The club had purchased the tract in 1890, and since then had used it for the purposes for which it was purchased, and as it used the rest of its wild and uncultivated land, to wit, as a game preserve and over which its members could hunt and fish.

Trails were cut through the forest across such lot. A boat landing was built upon the shore of a lake that was partly in this lot; just how it was built does not appear; and, possibly, although it does not distinctly appear to be so, notices warning all persons from trespassing upon the lot and that it was used as a private park, were posted upon the lot. I say that this fact does not distinctly appear, because the affidavits seem to be to the effect that the notices were posted "along the lines of the whole of said preserve," meaning that they were posted along the boundary lines of the whole 90,000 acres, and if this lot is in the middle of that tract there may not have been any notice within miles of this lot. And this lot was used by the club for the same purposes, and was cared for by the same caretakers and in the same manner that the rest of such 90,000 acres were used and cared for.

Does such a use and possession constitute the actual occupancy which the statute requires?

It is urged on the part of the club that it is the only possession of the many lots included within their large preserve which it is possible for them to take, and that an actual *pedis possessio* of each

of such lots is inconsistent with the purpose for which they were obtained. That seems to be so. The object of their ownership of the lands is to preserve them in as wild and unreclaimed a condition as possible, and an actual occupation of them, or such treatment of them as is declared in section 370 of the Code of Civil Procedure to amount to a possession and occupancy, would operate at once to defeat the very purpose of their use. There are many different lots within the boundaries of this 90,000-acre tract of which the club, because of its ownership thereof, has the constructive possession, but of which no one can be said to have the actual possession, and I am of the opinion that the lot in question was on of them.

The statute in question (§ 134) requires that the *person* upon whom notice must be served shall be in the "actual occupancy" of the tract or parcel of land which the Comptroller had sold, and it seems to me that, in the very nature of the use to which the club puts its land, it cannot have such an occupancy, nor can any of its servants have it, unless perhaps it be of some small parcel thereof upon which a permanent residing place has been created for him Although the occupancy here is not invoked for the purpose of establishing an adverse user, yet the definition given in section 134 of the Tax Law (*supra*) is at least as precise and explicit as was the word "possession" which section 370 of the Code defined. It must be the *actual* occupant upon whom the notice is to be served, and all the cases in which this phrase is defined or explained seem to be adverse to the claim which the Adirondack League Club here makes. (*People ex rel. Marsh* v. *Campbell*, 67 Hun, 590; S. C., 143 N. Y. 338; *Churchill* v. *Onderdonk*, 59 id. 134; *Thompson* v. *Burhans*, 79 id. 98, 99.)

There was nothing in the case at bar to indicate to the relator that the lot in question was in the "actual occupancy" of any one, and I am of the opinion that the determination of the Comptroller was erroneous and should be reversed.

All concurred, except SMITH and CHESTER, JJ., dissenting.

Determination of the Comptroller reversed, with fifty dollars costs and disbursements to the relator.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. A. G. HYDE & SONS, Relator, v. NATHAN L. MILLER, as Comptroller of the State of New York, Respondent.

Tax — assessment against a domestic corporation — what deduction should be made on account of its debts.

In assessing a franchise tax against a domestic corporation, the corporation is not entitled to have deducted from its gross assets the assets employed without the State of New York and together therewith its total liabilities, leaving the balance as the amount upon which the franchise tax shall be computed.

In such a case the corporation is entitled to a reduction from the value of the assets employed in the State of New York of only such proportionate amount of the liabilities of the corporation as is represented by the ratio of the assets employed within the State of New York to the entire assets of the corporation.

CERTIORARI issued out of the Supreme Court and attested on the 19th day of August, 1903, directed to Nathan L. Miller, as Comptroller of the State of New York, commanding him to certify and return to the office of the clerk of the county of Albany, all and singular his proceedings had in assessing a franchise tax upon the relator for the year ending October 31, 1902.

James J. Allen, for the relator.

John Cunneen, *Attorney-General*, and *William H. Wood*, for the respondent.

SMITH, J.:

This controversy presents a single question. This domestic corporation had assets amounting to $1,503,342, of which $868,043 were in New York, and $635,299 were outside the State of New York. Its liabilities amounted to $784,610.80. The Comptroller upon adjustment reduced the tax to $472.79, which amount was reached by assessing the tax upon the assets within this State reduced only by such proportion of the liabilities of the relator as would be represented by the amount of assets in this State as compared with the total assets. The relator claims that from the gross assets should be first deducted the assets without the State, next the total liabilities, and upon the balance only, which in this case would amount to $83,433, should the tax be computed.

In *People ex rel. Wiebusch & Hilger Co.* v. *Roberts* (19 App. Div. 574) this court under a similar statute laid down the rule contended for by the relator here. In 154 New York (at p. 101) is the report of this case in the Court of Appeals, where it was affirmed. In that case, Judge Martin, in writing for the court (at p. 106), says: "The record discloses the gross assets of the relator, its liabilities, and the amount of its exemptions. Therefore, if the cash value of the capital stock liable to be taxed, is to be measured by the net assets of the corporation, after deducting its liabilities and the amount of its capital that is exempt, then clearly the decision of the court below was correct." A reference to the facts of this case as shown in the report thereof in the Appellate Division discloses that the exemptions referred to by Judge Martin were the assets of the company without the State of New York. In this case, however, of the gross assets in this State and out of the State, amounting to $305,445, only $18,102 were without the State. The questions discussed in that case were, *first*, whether assets amounting to $30,000, consisting of unbroken packages imported from other States, could be the subject of taxation, and, *secondly*, whether the amount of assets should be reduced by the liabilities of the corporation. The question does not seem to have been raised as to whether those liabilities should be apportioned between the assets within the State and out of the State. In that case the assets out of the State were so small that the question was practically an immaterial one. For these reasons, I do not deem these authorities as controlling upon the issue here presented. The relator also relies upon the case of *People ex rel. Thurber, Whyland Co.* v. *Barker* (141 N. Y. 118). In that case the relator, a foreign corporation, was taxed upon moneys invested in the State of New York. It was there held that no part of the indebtedness of the company was to be deducted from the assets in the State of New York. This case is somewhat limited by the decision in *People ex rel. Milling Co.* v. *Barker* (147 N. Y. 31). It is claimed by the relator that if under our statute (Laws of 1896, chap. 908, § 182, as amd. by Laws of 1901, chap. 558) there is to be deducted from the assets in this State only a proportion of the indebtedness of the corporation, we cannot with good grace refuse to deduct from the assets of a foreign corporation found in this State a part of the indebtedness of such

corporation proportioned to the aggregate assets of such corporation. In the case cited it was pointed out that the statute required the mode of taxation, viz., the same as if they were residents of this State. Judge PECKHAM, in writing for the court in that case, says: "The resident has no right to deduct his indebtedness from any specific piece of personal property or from any special chose in action. In a general way it may be said that he is to be charged with all his personal property, and from that total he may deduct his debts. This cannot be done in the case of a non-resident, although it may (as we may assume) be done at his domicile. All we are to do is to assess and tax the sum here invested, and the equities must, as we have said, be adjusted at the domicile of the person." If, therefore, under this opinion, the domestic corporation were assessed for all of its assets in this State, equity would demand the deduction of all the indebtedness. Whereas, however, the assessment is for only such part of the assets as are employed within this state, there are, I think, no equities to be adjusted which require the deduction of more than a proportionate amount of the indebtedness.

Not only does this adjustment seem equitable, but otherwise many domestic corporations would wholly escape taxation within this State for the "right to live," which is given by the State and which is the basis of this tax. Large corporate business can hardly be done without the employment of extensive credit, and with considerable property in other States, as many domestic corporations have, the portion of assets within this State might easily and often be overbalanced by the indebtedness. We are of the opinion, therefore, that the Comptroller rightfully interpreted the law as requiring a reduction from the value of the assets in this State only of such proportionate amount of the liabilities of the corporation as is represented by the ratio of the capital stock employed within this State to the entire capital of the corporation.

The determination of the Comptroller should, therefore, be confirmed, with fifty dollars costs and disbursements.

Determination of the Comptroller unanimously confirmed, with fifty dollars costs and disbursements.

DECISIONS

IN

CASES NOT REPORTED IN FULL.

First Department, January, 1904.

Thomas Cover and Others, Appellants, v. George Wolf, Respondent, Impleaded with Moritz Neuman and Others, Defendants.— Order reversed and motion granted, without costs, with leave to defendant respondent to answer anew if so advised.— Appeal from an order denying a motion to discontinue the action as against certain of the defendants, and to amend summons and pleadings by striking the names of such defendants therefrom.—

Per Curiam: For the reasons stated in the opinion in *Chapman* v. *Wolf* (89 App. Div. 563), the order appealed from should be reversed and the motion granted, without costs, with leave to the defendant respondent to answer anew if so advised. Present — Van Brunt, P. J., O'Brien, Ingraham, McLaughlin and Hatch, JJ.

Betty Frank and Others, Appellants, v. George Wolf, Respondent, Impleaded with Moritz Neuman and Others, Defendants.— Order reversed and motion granted, without costs, with leave to defendant respondent to answer anew if so advised.— Appeal from an order denying a motion to discontinue the action as against certain of the defendants, and to amend summons and pleadings by striking the names of such defendants therefrom.—

Per Curiam: For the reasons stated in the opinion in *Chapman* v. *Wolf* (89 App. Div. 563), the order appealed from should be reversed and the motion granted, without costs, with leave to the defendant respondent to answer anew if so advised. Present — Van Brunt, P. J., O'Brien, Ingraham, McLaughlin and Hatch, JJ.

The Tenement House Department of the City of New York, Respondent, v. Katie Moeschen, Appellant.— Determination of the Appellate Term affirmed, with costs.— Appeal from a determination of the Appellate Term affirming a judgment of the Municipal Court.—

Per Curiam: For the reasons stated in the opinion in *Tenement House Department* v. *Moeschen* (89 App. Div. 526), the determination of the Appellate Term should be affirmed, with costs. Present — OBrien, Ingraham, McLaughlin and Hatch, JJ.

Robert A. Lytle and Hannah Steininger, Respondents, v. James R. Crawford and Others, Constituting the Bank of Dothan, Appellants.— Judgment affirmed, with costs. — Appeal from a judgment entered upon a verdict directed by the court.—

Van Brunt, P. J.: It is not necessary to restate the principal facts developed upon the retrial of this action, the same having been set forth in the opinion of this court when the case was here upon a former appeal (69 App. Div. 273). The only point upon which new evidence was sought to be introduced related to the rescission of the transaction of Monday, November seventh, by what took place between the agent of the plaintiffs and Drewry on Tuesday, the eighth. It is claimed on the part of the defendants that upon Tuesday the transaction of Monday was rescinded and the cotton mentioned in Monday's transaction was resold to Drewry, he agreeing to make payments therefor in a different manner from that which he had attempted to do upon the day previous. It is claimed upon the part of the plaintiffs that whatever agreement was made on Tuesday was never carried into effect, because the check in question was never returned to Drewry, nor were the warehouse receipts for the cotton delivered to him, nor did the plaintiffs' agent place him in possession of the same. Upon the second trial of this action the defendants were allowed to amend their answer by alleging the rescission of the contract of Monday, November seventh, upon Tuesday, November eighth; and they sought to establish that fact by the introduction in evidence of the judgment roll in an action brought by the defendants against the plaintiffs in the State of Georgia upon the promissory notes mentioned in the counterclaim in the original answer. But an examination of that judgment roll shows that no such issue was passed upon therein. It appears therefrom that the defendants' (the plaintiffs in this action) first answer to the complaint was that they never executed the notes; and the second was, that the plaintiffs (the defendants in this action) had converted certain cotton belonging to the defendants to their own use; and they made a further answer that they did not sign the notes sued on and that one John Drewry gave to the defendants a check on the plaintiffs, who were their bankers, and that the plaintiffs accepted said check in full payment of the notes, and further that the entire amount of the notes was usurious. The jury seem to have found a verdict for the plaintiffs in that action negativing all these defenses. Upon the previous appeal it was held that the judgment could not establish the notes referred to in the counterclaim for the reason that the notes were merged therein, and there was nothing in the judgment tending to establish anything which was contained in the new defense; consequently there was no evidence whatever in the case contradicting the testimony of Drewry that the rescission had never been carried into effect because the notes and cotton had never been delivered to him. It is also urged that the proceedings taken by the plaintiffs in this action against Drewry upon his alleged due bill indicated an election to hold Drewry, and, consequently, to release the defendants. In this connection it is sufficient to say that, if any election was made, it was made when this action was commenced, which was prior to the time of the proceedings against Drewry in Georgia. It is to be observed that the proceedings in Georgia do not seem to have gone any further than an attempt to establish an attachment against certain property alleged to belong to Drewry, which in the proceeding was determined to belong to a third party. Upon the whole case, therefore, it does not appear that there was any evidence whatever

to establish the new defense set up in the amended answer that there had been a rescission on November eighth of that which had taken place on November seventh. The judgment should, therefore, be affirmed, with costs. O'Brien, Ingraham, McLaughlin and Laughlin, JJ., concurred.

Alfred Hayes Jr., as Assignee for the Benefit of Creditors of the Firm of Seymour, Johnson & Company, Respondent, v. Winifred Ammon, Appellant, Impleaded with Others. — Judgment reversed and new trial ordered, with costs to appellant to abide event. — Appeal from a judgment entered after a trial at Special Term.—

VAN BRUNT, P. J.: This action was brought to set aside a transfer of certain property made by the plaintiff's assignors, upon the ground that such transfer was made with the intent to create a preference and after the assignment to the plaintiff was made. The complaint alleges in substance that on January 2, 1900, the defendants Henry A. Seymour, Frederick W. Johnson and David Webster organized a limited partnership, in which Seymour and Johnson were the general partners and Webster was the special partner; that on the 28th day of May, 1900, Seymour and Johnson executed a general assignment for the benefit of creditors to the plaintiff Hayes, who duly qualified; that at or about or subsequently to the execution of the assignment the defendant Seymour transferred and delivered to the defendant Ammon, a creditor of the firm, certain property in said complaint named belonging to said firm or one of the general partners; that said firm was then insolvent and known so to be by the defendants, and that said transfer was made for the purpose of giving a preference to the defendant Ammon over the other creditors. Judgment is demanded for the setting aside of the said transfer and a recovery of the property or its proceeds. It seems to be conceded upon this appeal that there was a sufficient consideration for the transfer, and that it was valid unless the same was made after the execution of the assignment to the plaintiff. Even if this concession were not made, the evidence clearly shows that the money was advanced upon the Friday, upon the distinct understanding that the same was to be repaid upon the Saturday or Monday following, or security given therefor, and that it was in pursuance of this agreement, upon the faith of which the money was advanced, that the property in question was delivered to the defendant Ammon on the Monday following. The only question that seems to have been litigated was, whether the property was delivered before or after the execution of the assignment. In the evidence there seems to be considerable confusion arising from the fact that *signing* and *execution* seem sometimes to be used as synonymous terms, which they are not. Execution implies complete execution — signing, sealing and delivery; whereas signing implies only one of the steps towards execution. The evidence shows that the defendant Ammon learned of the fact that the firm would have to make an assignment on Sunday, May twenty-seventh, and that she went early on the Monday morning following to Mr. Johnson's house to see what could be done about the payment of the loan or the giving of security therefor, as promised at the time the loan was made. She and Johnson arrived at Seymour, Johnson & Co.'s office at about a quarter to nine, and Seymour came in later. Seymour and the defendant Ammon went to the bank, and as soon as the bank opened they tried to get a check of the firm cashed for the amount of the loan. While they were gone the defendant Johnson says he signed and delivered the assignment to the plaintiff, the assignee therein named. The defendant Johnson testifies that he met Seymour and the defendant Ammon at the bank, and seems to have left them there. He also testifies that he signed and delivered the assignment to the plaintiff before he went to the bank. Seymour and the defendant Ammon, after their unsuccessful attempt to get the check cashed, returned to the office, and shortly after Seymour gave to the defendant Ammon a check and cotton certificates to the amount of $7,700. Johnson testifies that Seymour had signed the assignment before he said to the defendant Ammon, "Here is $7,700," which remark was made immediately after handing the cotton certificates and check. The plaintiff testifies that the defendant Johnson signed and delivered the assignment at about five minutes to ten, Seymour not being in the office at the time, and that Seymour came in and executed the assignment something more than half an hour later. By execution it is apparent that the witness meant signed, as he subsequently says, "Mr. Seymour delivered the assignment to me," but does not say that such delivery was simultaneous with the signing or immediately after. In another part of his testimony he says that the assignment was executed and delivered not later than half-past ten — another indication that where the witness speaks of execution he meant only the act of signing. Mr. Seymour testified: "I think I gave Mrs. Ammon the cotton receipts after I signed my name to that paper," referring to the assignment. He says that it was about half-past ten for him when the receipts were given; that the notary was in the office at the time, but he does not know whether the plaintiff had signed the assignment at that time, or when it was acknowledged by any of the parties. There is, therefore, no evidence that this delivery of securities and check to the defendant Ammon was made after the complete execution of the assignment, by delivery to the plaintiff; and it would seem, therefore, that there was no evidence to invalidate the title of the defendant Ammon. A delivery of the property after the assignment had become operative would have been a fraud upon the assignment, and no presumptions can be indulged in that such fraud has been perpetrated. In this condition of the evidence the court was not justified in holding that an improper preference had been given. The judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event. Patterson, Ingraham, Hatch and Laughlin, JJ., concurred.

Mary Sweeny and John L. Jordan, as Administrators, etc., of Denis Sweeny, Sr., Deceased, Appellants, v. L. Laflin Kellogg, Respondent.— Judgment reversed and new trial ordered, with costs to appellant to abide event. — Appeal from a judgment dismissing the complaint after a trial at Trial Term, and from an order denying a motion for a new trial.—

PATTERSON, J.: This judgment must be reversed. It appears that the firm D. Sweeny's Sons brought suit against the city of New York for $106,080. Kellogg & Rose (of which firm the defendant was a member) were the plaintiffs' attorneys. The claim was composed of two items, one for $23,427, for work done by D. Sweeny's Sons, and the other for $82,653 for work claimed to have been done by J W. Cody & Co. While the suit was pending, the firm of

Cody & Co. assigned its entire interest therein to one Adams, and Sweeny's Sons assigned to him an interest in the amount claimed, to the extent of $4,200. Thereafter Sweeny's Sons assigned to the plaintiffs' intestate their entire remaining interest in the action. After these assignments were made, Sweeny's Sons recovered a judgment against the city on both claims for $92,549.62. The respective interests of Sweeny's Sons and of Cody & Co. in the amount recovered were not separately stated by the referee, and negotiations were had between Mr. Swift, the attorney for the plaintiffs' intestate, and Mr. Kellogg, acting for Adams, to determine how much their clients should respectively receive of the amount recovered. It was ultimately agreed that the plaintiffs' intestate should receive $13,000, less $1,500, which was to be paid to Kellogg for his services as attorney in the action against the city. After that agreement was made the amount of the judgment was reduced to $85,988.60, but the agreement as to the distribution remained. Thereafter a claim was made to a part of the share of the plaintiffs' intestate, and it was agreed to leave $2,500 of the $13,000 on deposit with the comptroller of the city of New York, and thus the plaintiffs' intestate's claimed share was reduced to $9,000. An arrangement was then made by which Kellogg was to receive all the money from the comptroller, and he did receive the $83,438.80. Thereafter Kellogg refused to pay $9,000 to the plaintiffs' intestate, and insisted that he was entitled to retain out of that sum $4,200, with interest, being the amount (represented by two promissory notes) of D. Sweeny's Sons' assignment to Adams. An arrangement was made by which Mr. Kellogg kept possession of the amount he claimed was due Adams, and paid over the balance of the $9,000, viz., $4,516.25, to the plaintiffs' intestate, the parties agreeing that the rights of the plaintiffs' intestate and of Adams to the sum retained should be determined by the court. The issue is as to the agreement between the parties, the plaintiffs claiming to be entitled to $9,000, and the defendant insisting upon Adams' right to deduct the $4,200 and interest from the $9,000. The court below held with the defendant and dismissed the complaint. In the state of the proof that ruling was erroneous. The correspondence and the whole evidence show, so far as the case was developed, that what was in contemplation between Swift, the attorney for the plaintiffs' intestate, and Kellogg, the attorney for Adams, was simply the ascertainment of the distributive amounts to which those two persons would be entitled out of the proceeds of the judgment. Mr. Swift testified that on the 4th of March, 1901, he, the members of the firm of Sweeny's Sons, and Kellogg and Adams, met in Mr. Kellogg's office for the purpose of distributing the fund; that at that time Sweeny's Sons claimed they ought to get $20,000, and Adams the remainder. Kellogg, as attorney for Adams, disputed that and claimed that the copartnership should only get $8,800. That was before the money was paid over by the comptroller. On the 5th of March, 1901, Swift wrote Kellogg on behalf of the plaintiff's intestate, a letter, as follows:

"*March* 5, 1901.

"L. LAFLIN KELLOGG, Esq.,
"120 Broadway, N. Y.

"My Dear Mr. KELLOGG:

"I have heard from Mr. Denis Sweeny, Sr., since our meeting yesterday, and he wishes me to inform you that he will agree to accept $13,000.00 out of the recovery from the judgment, provided his offer is accepted at once, and I am to notify him by to-morrow morning whether or not it is accepted. He says that he will not entertain any counter offer. Yours very truly,

"FREDERIC J. SWIFT.

"I send this to you as Mr. Adams seems to have left the division in your hands, without knowing what he really is entitled to."

On March 8, 1901, Kellogg wrote Swift as follows: "Mr. A. J. Adams, Sr., declines to diminish his claim in any respect." The matter thus stood until the eighteenth of April, when Mr. Kellogg talked with Swift over the telephone and proposed that he admit that $8,800 was due the copartnership of Sweeny's Sons, and it was stated that Swift wanted $13,000, and that out of that he (Kellogg) ought to get $1,500 in fees, which would reduce the amount to $11,500, and then Kellogg said: "If you will split the difference between the $11,500 and the $8,800, making $10,150, I will get Mr. Adams to take that." Swift swears that he rejected that and stood on the original offer, and that it so remained until the 3d of May, 1901, when Kellogg called up Swift again on the telephone and proposed to settle for the sum of $13,000, provided the plaintiffs' intestate would pay him out of the $13,000 the sum of $1,500 for his services, leaving $11,500 *net* for Mr. Sweeny. Swift then says that that was accepted on the same day. In June, 1901, Kellogg wrote to Swift, among other things: "It will be necessary for you to procure papers releasing the claim of the elder Sweeny upon the payment of $11,500, and also of the claim of the judgment against Sweeny, which is a lien on the fund. By leaving and trusting them with me the settlement will be carried out, and I can draw the money whether you are in town or not. Of course, I will account to you." It is apparent from this testimony of Swift that what was in negotiation between Kellogg and himself was the subject only of how much of the fund to be distributed the plaintiffs' intestate was actually to receive and how much Adams was to receive. Swift's testimony is distinctly that the *net* amount to be received by the plaintiffs' intestate was fixed at $11,500. Both of the attorneys negotiating knew of the claims and of the assignments. Kellogg knew fully what had been assigned to Adams. The whole matter turns upon the agreement and understanding between the two attorneys as to the actual amount each party was to receive. Swift swore it was to be a net sum for his client, and there is nothing in the correspondence between Swift and Kellogg which contradicts that statement. If such were the fact, the plaintiffs were entitled to recover and the court erred in dismissing the complaint. If such were not the fact, Kellogg was called upon to refute this evidence. The judgment must be reversed and a new trial ordered, with costs to appellant to abide the event. O'Brien, McLaughlin and Laughlin, JJ., concurred; Van Brunt, P. J., dissented.

The People of the State of New York, Respondent, v. Ewan H. Clark, Appellant, Impleaded with Ignatius L. Qualey and Others.— Judgment affirmed.— Appeal from a judgment entered on conviction of defendant for the crime of grand larceny in the first degree.—

INGRAHAM, J.: The same questions are presented in this case as in the case of *People* v. *Putnam* (*ante* p. 125). We therein

indicated our reasons for affirming that judgment, and what is there said will apply to this case, there being no substantial difference in the questions presented. For the reasons there stated the judgment is affirmed. Van Brunt, P. J., Patterson, Hatch and Laughlin, JJ., concurred.

Benjamin L. M. Bates v. Frederick Holbrook and Others.— Motion to dismiss appeal denied.

Joseph McWilliams, Appellant, v. Metropolitan Street Railway Company, Respondent.— Judgment and order affirmed, with costs. No opinion.

Harris Ulanoff, Appellant, v. Barnet Cohen, Respondent.— Judgment affirmed, with costs. No opinion.

In the Matter of Proving the Last Will and Testament of Mary Ann Wilson, Deceased, as a Will of Real and Personal Property. Michael Dwyer and Margaret Lynn, Appellants; Rollin M. Morgan, Respondent.— Decree affirmed, with costs. No opinion. (Hatch, J., dissenting.)

William P. Cunningham and Philip J. Kearns, Appellants, v. The City of New York, Respondent.— Order affirmed, with costs. No opinion.

Anna C. Kelly, Appellant, v. The Greenwich Savings Bank, Defendant, Interpleaded with Thomas O'Brien, as Administrator, etc., of Daniel O'Brien, Deceased, Respondent.— Judgment affirmed, with costs. No opinion.

George T. Maxwell, Respondent, v. James K. Whitaker, Appellant, Impleaded with Harry B. Hollins and Others, Respondents, and Others, Defendants.— Judgment affirmed, with costs. No opinion.

Harris Livingston, Respondent, v. The Fidelity and Casualty Company of New York, Appellant.— Judgment and order affirmed, with costs. No opinion.

Edward McCann, Appellant, v. The North British and Mercantile Insurance Company of London and Edinburgh, Respondent.— Judgment and order affirmed, with costs. No opinion.

Louis Horowitz, Respondent, v. Max Reiss, Appellant.— Judgment and order affirmed, with costs. No opinion.

Lizzie Hastings Holme, Appellant, v. Leicester Holme, Respondent, Impleaded with William H. Phillips.— Order affirmed, with ten dollars costs and disbursements. No opinion.

In the Matter of the Application of the City of New York, by the Board of Docks, Relative to Acquiring Title to Certain Lands and Premises on Tenth and Thirteenth Avenues, Little West Twelfth and Thirteenth Streets in the Borough of Manhattan. Peter D. Strauch, Appellant, v. The City of New York and William Waldorf Astor, Respondents.— Order affirmed, with costs. No opinion.

The People of the State of New York ex rel. A. Hupfel's Sons, Respondent, v. Patrick W. Cullinan, as State Commissioner of Excise of the State of New York, Appellant.— Order affirmed, with fifty dollars costs and disbursements. No opinion.

The People of the State of New York ex rel. Archibald Robinson, Appellant, v. Thomas Sturgis, Fire Commissioner of the City of New York, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion.

Rosa W. Friedman, Respondent, v. Benjamin Friedman, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion.

In the Matter of the Application of Terance McArdle, Appellant, for a Peremptory Writ of Mandamus, v. John McGaw Woodbury, Commissioner of Street Cleaning, City of New York, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion.

William D. Martin, Respondent, v. The New Trinidad Lake Asphalt Company, Limited, Appellant. — Order affirmed, with ten dollars costs and disbursements. No opinion.

In the Matter of Ira G. Darrin, as Receiver.— Order affirmed, with ten dollars costs and disbursements. No opinion.

Mary K. Desmond, Appellant, v. The Murray Lenox Land Company, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion.

Mary Donohue, Respondent, v. Metropolitan Street Railway Company, Appellant.— Judgment and order affirmed, with costs. No opinion.

The People of the State of New York, Respondent, v. Walter D. Valentine and William S. Fender, Appellants.— Judgment affirmed. No opinion.

The People of the State of New York ex rel. David Day, Relator, v. Francis V. Greene, as Police Commissioner of the City of New York, and Alexander R. Piper, as Second Deputy Police Commissioner of the City of New York, Respondents.— Writ dismissed and proceedings affirmed, with costs. No opinion.

Ellen B. Cudlip v. New York Evening Journal Publishing Company. — Motion denied.

James O'Neill, Respondent, v. Metropolitan Street Railway Company, Appellant.— Judgment and order affirmed, with costs. No opinion.

The People of the State of New York ex rel. John P. Reilly, Relator, v. Francis V. Greene, Police Commissioner of the Police Department of the City of New York, Respondent. — Writ dismissed and proceedings affirmed, with costs. No opinion.

David Perez, as Administrator, etc., of Michael Perez, Deceased, Respondent, v. Bernard Sandrowitz, Appellant. — Judgment and order affirmed, with costs. No opinion. (Laughlin, J., dissenting.)

The City of New York, Respondent, v. Charles A. Brown and John Fleming, Appellants. — Judgment and order affirmed, with costs. No opinion.

George E. Trauber, Appellant, v. The Third Avenue Railroad Company, Respondent. — Judgment affirmed, with costs. No opinion.

Mortimer Falk and Others, Respondents, v. The American West Indies Trading Company, Appellant. — Appeal from decision and report of referee and from order confirming same dismissed. Judgment affirmed, with costs. No opinion.

The People of the State of New York ex rel. Mary E. Kelley, Appellant, v. Richard H. Adams and Others, Composing the Board of Education of the City of New York, and Others, Respondents. — Judgment affirmed, with costs. No opinion.

Tompkins McIlvaine v. George Steinson.— Motion denied, with ten dollars costs.

New Jersey Steel and Iron Company v. Andrew J. Robinson and Others.— Motion denied, with ten dollars costs to each of the parties opposing.

The People of the State of New York v. Gaetano Fucarino.— Motion denied.

Henry B. Sire v. Sam S. Shubert.— Motion denied, with ten dollars costs.

Albert Simar v. John L. Shea.— Motion denied, with ten dollars costs.

Francis Le Provost v. Ernest Rau and Others. — Motion denied on payment of ten dollars costs, and, on payment of an additional ten dollars, leave given to apply to the court below to open default.

Anna P. Rettagliata v. Thomas J. Hayward.— Motion granted.

The People of the State of New York v. United States Mutual Accident Association.— Motion denied, with ten dollars costs.

Moses Tanenbaum v. Gustav Lippman.— Motion denied, with ten dollars costs.

John O. Ball v. Manhattan Railway Company. — Motion denied, with ten dollars costs.

Samuel E. Fairfield v. James S. Dumas.— Motion granted, with ten dollars costs.

Mary C. Fairfield v. James S. Dumas.— Motion granted, with ten dollars costs.

Frederick Williamson v. Press Publishing Company.— Motion granted, with ten dollars costs.

Elizabeth J. Saward v. Jeremiah J. Campion. — Motion granted, with ten dollars costs.

The People of the State of New York v. Joseph Beyer. The People of the State of New York v. George Talbot. The People of the State of New York v. Lawrence Murphy. The People of the State of New York v. Jacob Granowitz. The People of the State of New York v. John Foley and Others. The People of the State of New York v. John Foley and Others.— Motions to dismiss appeals granted.

The People of the State of New York, Respondent, v. Abraham Kestlinger, Appellant. — Judgment affirmed. No opinion.

Jacob Schrumpf and Mary A. Schrumpf, Respondents, v. The Manhattan Railway Company, Appellant.— Judgment affirmed, with costs. No opinion.

In the Matter of Orlo Atwood and Others.— Decree affirmed, with costs. No opinion.

Thomas Cummings, Respondent, v. Metropolitan Street Railway Company, Appellant. Judgment and order affirmed, with costs. No opinion.

In the Matter of the Judicial Settlement of the Final Account of J. Montgomery Strong, as Executor, etc., of Elizabeth L. Strong, Deceased, Appellant. Mary L. Spencer and Others, Respondents.— Decree affirmed, with costs. No opinion.

Katherine L. Schuyler, Respondent, v. Metropolitan Street Railway Company, Appellant. —Judgment and order affirmed, with costs. No opinion.

James Bradley, Respondent, v. Peter Wagner and Others, Appellants.— Judgment affirmed, with costs. No opinion.

Martin J. Ward, Respondent, v. Charles R. Myers, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion.

Francis H. Wall, Plaintiff, v. The United Electric Light and Power Company, Respondent; George W. Simpson, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion.

In the Matter of the Petition of Patrick W. Cullinan, as State Commissioner of Excise, Appellant, for an Order Revoking and Canceling Liquor Tax Certificate No. 11,562, Issued to Max J. Porges, Respondent.— Judgment and order affirmed, with costs. No opinion.

Ella Josephine Snead, Appellant, v. Metropolitan Street Railway Company, Respondent.—Order affirmed, with costs. No opinion.

Amos Edward Woodruff, Appellant, v. William G. Alger, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion.

Isaac L. Stern, Respondent, v. The Wabash Railroad Company, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Salvatore Ragona, Respondent, v. Raffaela Palmieri, Defendant; John Palmieri, as Executor, etc., of Raffaela Palmieri, Deceased, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion.

Aaron J. Friedman, Respondent, v. Isaiah Friesner and Max Bruckner, Appellants.— Judgment and order affirmed, with costs.

The People of the State of New York v. Robert L. Martin and Harry Velthusen.— Motion granted.

The People of the State of New York v. Robert L. Martin and Harry Velthusen.—Motion granted.

Patrick W. Cullinan v. Mary E. Higgins and Others.— Motion denied.

The People of the State of New York v. Philip Engel.—Motion granted.

Charles L Cammann and Others v. Freeman F. Huntington.— Motion denied, with ten dollars costs.

In the Matter of Robert A. Van Wyck and Others.— Motion denied.

Daniel V. Arthur v. Henry B. Sire.— Motion denied, with ten dollars costs.

Elizabeth C. Connor, as Administratrix, etc., v. Henry C. F. Koch and Others.—Motion denied, with ten dollars costs.

Philip Stromberg, Respondent, v. The Tribune Association, Appellant.— Motion granted.

George W. Thurston v. Cypress Hills Cemetery and Others.— Motion denied, with ten dollars costs.

The Farmers' Loan and Trust Company, as Substituted Trustee under the Last Will and Testament of William S. Pendleton, Deceased, Respondent, v. Jennie F. Pendleton, as Executrix, etc., of John M. Pendleton, Deceased, Sole Surviving Trustee under the Last Will and Testament of William S. Pendleton, Deceased, Appellant.— Judgment affirmed, with costs, on opinion in the court below. (Reported in 37 Misc. Rep. 256.)

FOURTH DEPARTMENT, JANUARY, 1904.

Alexander B. Williams, Respondent, v. George A. Brandt, Appellant.—Judgment and order reversed and new trial ordered, with costs to the appellant to abide event.— Appeal from a judgment of the Supreme Court, entered in the Wayne county clerk's office May 23, 1903, and from an order denying a motion for a new trial made upon the minutes of the court.—

WILLIAMS, J.: The judgment and order should be reversed and a new trial granted, with costs to the appellant to abide event. The action was brought to recover the purchase price of a carload of coal. At the close of the evidence the court directed a verdict for the plaintiff. This decision was apparently based upon the proposition that a sale was made by the plaintiff's son, Harry, about the 7th or 8th of October, 1902, and the coal was delivered under that sale about October 18 or 19, 1902. Harry Williams testified to such sale, made at plaintiff's warehouse in Sodus village, and there was some evidence given by other witnesses corroborating his testimony, and if that evidence had been uncontradicted there would have been no error in the direction of the verdict. But the evidence of the defendant was not in accord with the evidence given in behalf of the plaintiff. The defendant testified that he had some negotiations with a man by the name of Turner, who was an employee of

plaintiff about the purchase of a carload of Lykens Valley coal, and then he met Harry Williams on the occasion when plaintiff claims the sale was made, and asked him why they had not sent the coal, and Harry said he knew nothing about it; that Turner knew about that, and when he came back they would let the defendant know about it; that there was coal back in the shed, which was all the coal he knew about; that he, defendant, went out and looked at the coal and came back and told Harry that that was not the coal he had bought of Turner, Lykens Valley coal, and Harry said he didn't know anything about it, and he, defendant, would have to wait for Turner to come back. Subsequently the coal was delivered, but was not Lykens Valley coal, and the defendant refused to accept it. It will thus be seen that defendant claimed to have negotiated for the purchase of the coal with Turner, and that he made no purchase from Harry Williams, and that his alleged purchase was only of Lykens Valley coal, which was never delivered to or received by him, the defendant. There was a dispute as to whether Turner had authority to act for plaintiff in the sale of the coal, and it was claimed such agency was denied by plaintiff and was not proven by defendant. A sale by Harry Williams was not conceded, but was denied. A verdict could not, therefore, be directed based upon such a sale. If the sale was made by Turner, and he had authority to make it, then defendant claimed the coal delivered was not the kind of coal purchased, and that he refused to accept it. The defendant requested the court to submit to the jury the question whether the contract made was that alleged by the plaintiff or that alleged by defendant, and whether Turner had authority to make a sale of coal for the plaintiff. These requests were refused. Errors were committed by the court in directing the verdict and refusing such requests, which require a reversal of the judgment and order and the granting of a new trial. All concurred; Spring and Hiscock, JJ., also vote for reversal upon the ground that it was reversible error to exclude evidence of the conversation between the defendant and Turner.

Margaret H. Jones, Individually and as Executrix, etc., of Lydia J. Howell, Deceased, Appellant, v. Elizabeth H. Thomas and Others, Respondents.— Judgment affirmed, with costs, upon authority of same case, reported 76 Appellate Division, 596, and upon the opinion of the referee herein. All concurred, except McLennan, P. J., who dissented upon the ground that the referee committed error prejudicial to the plaintiff in permitting the defendants Bullock and Perkins to testify to conversations and personal transactions had with Lydia J. Howell, deceased, of whose estate plaintiff is executrix, under section 829 of the Code of Civil Procedure, because each of said witnesses was interested in the event of the action. Stover, J., concurred with McLennan, P. J., in so far as he holds that the admission of the testimony of the witnesses Bullock and Perkins, referred to, was error, but there being ample evidence outside of the testimony of such witnesses to sustain the findings of the referee, this court on appeal should, under section 998 of the Code of Civil Procedure, disregard such error and affirm the judgment. The following is the opinion of Charles A. Miller, Esq., referee:

MILLER, Referee: Simon John died in the year 1847, leaving a will by which he bequeathed and devised his residuary estate to his widow, Maria John, for life, "and to be at her disposal after my decease," the remainder to his daughter, Lydia J. Howell, for life, "and then to my grandchildren, the sons and daughters of my daughter Mary Hughes, deceased, and to the children of his daughter Lydia Howell, if any, to be equally divided among them." The testator also appointed his widow, Maria John, his executrix. She duly qualified, and it is undisputed that upon the settlement of her account as executrix she received the net estate, which consisted of a farm in the town of Marcy, and personal property to the amount of $2,962.98. She never disposed of the farm, and there is no evidence that she exercised any power of disposition as to any part of the personal estate. Maria John survived her husband until 1853, when she died intestate, and letters of administration upon her estate issued to Llewelyn D. Howell, her son-in-law, and Edward S. Hughes, her grandson. These administrators caused an inventory to be made of the personal property of their intestate, the items of which, as appraised, amounted to $5,581.64; they then made the following entry on the inventory: "Deduct amount of property left on final settlement of estate of late Simon John, $2,962.98 — $2,598.66." In their final account as administrators they state the amount of the inventory at this sum ($2,598.66), and add to it income amounting to $73.14, and deduct expenses, etc., amounting to $274.17, leaving a net estate of $2,397.63, which they divided among the next of kin. What disposition they made of the $2,962.98 which they deducted from the inventory as being property "left on final settlement of estate of late Simon John" is not disclosed by their account or by any of the records in the Surrogate's Court. Llewelyn D. Howell died in the summer of 1864, leaving a considerable estate, which he devised and bequeathed to his widow, Lydia J. Howell. Edward S. Hughes, the other administrator, survived Howell for some years, but died prior to Lydia Howell, as did all the grandchildren of Simon John, who were entitled to the remainder of his estate after the expiration of the second life estate created by his will. Lydia Howell died in 1899 leaving no descendants, and upon her death, the answering defendants, who are the surviving descendants of the deceased remaindermen, presented to her executors, the plaintiffs in this action, claims to the fund of $2,962.98 belonging to the estate of Simon John, which they allege was in the possession of Lydia J. Howell as life tenant at the time of her death. About the foregoing facts there is no substantial dispute and the question at issue turns largely on the inferences and presumptions which are to be drawn from them. In reaching a conclusion on the subject, I have been greatly aided by other evidence, to which I shall refer, which, while it cannot be said to be entirely undisputed, is at all events not rebutted in any way, and the result arrived at seems to me to be entirely consistent with all the evidence in the case — with that given in behalf of the plaintiffs as well as with that of the defendants. The first question presented is whether or not Maria John during her life expended or consumed any of the *corpus* of the fund left by her husband. On the previous trials of the action the parties have conceded that under the terms of the will she had the right to do this, but on the present trial no such concession has been made, and it would probably be necessary to determine the true intent of the testator, in this particular, at the outset of the present inquiry, if it were not for the facts which seem to make it clear

that she never exercised any right of disposal of the *corpus*, if she had any. Among the securities left by Simon John, as shown by the inventory of his estate, were the following: Bond and mortgage of David Winston, dated March 26, 1844, $200; promissory note of David Winston, dated May 1, 1845, $100; promissory note of Oriskany Mfg. Co. guaranteed by S. Newton Dexter, dated December 22, 1846, $2,700: promissory note of Jacob Rutt, dated February 1, 1847, $100; promissory note of Jacob Rutt, dated December 31, 1845, $100. Among the securities left by Maria John, as shown by the inventory of her estate, were: Bond and mortgage of David Winston, dated March 26, 1844, and interest, $204.06; promissory note of D. Winston, dated November 25, 1852, and interest, $104.43; promissory note of Oriskany Mfg. Co. with name of S. Newton Dexter as surety, dated March 9, 1853, and interest, $1,024.10; promissory note of Oriskany Mfg. Co., dated March 9, 1852, and interest, $021.69; promissory note of Jacob Rutt, dated January 5, 1848, with interest, $207.31. This, I think, traces satisfactorily $2,400 of this fund, and demonstrates that to that extent Maria John kept it intact, while, as to the balance, the statement made by her administrators on the inventory, and the fact that all persons interested have acquiesced in it by accepting the division made on the settlement of the Maria John estate seem to be conclusive. L. D. Howell, one of the administrators who made the Maria John inventory, appears to have been relied upon and trusted by Maria John during her life. He signs and verifies the petition for the final judicial settlement of her accounts as executrix of her husband, although the petition is made in her name. He appears as a witness on the hearing and testifies: "I & wife took care of every, thing from 10 Aug. '44,* to 22 Oct. '47. Attended to all business for estate, inventory, sale, proving will, etc." He, therefore, was very probably in a position to know what disposition she had made of the funds received from her husband, and the fact that he deducted the full amount of this fund from the inventory of her assets settles the question and establishes the fact that upon the death of Maria John the *corpus* of the Simon John estate passed unimpaired into the hands of her personal representatives. The next step in this investigation is to ascertain what these administrators did with this fund. As to Edward Hughes, the answer is easy. He was a cripple, and though at one time he was justice of the peace in his country hamlet, his services to the public in his official character and his efforts in conducting a small grocery store do not seem to have been sufficiently remunerative to support him, and he was dependent upon his brother, with whom he resided, and upon the other relatives, to some extent at least, for his support. Those who knew him best seem to have had no knowledge of his holding any funds belonging to the Simon John or any other estate, and at his death he left no property of any kind except his personal effects. These facts, together with his statement to a Mr. Davies, to which I shall refer, have convinced me that though technically the fund in question came into the joint possession of both the administrators of Maria John, as a matter of fact it never actually came into the hands of Edward Hughes, but instead remained in the possession and control of his coadministrator, L. D. Howell, who was a man of large business experience and, we have seen, familiar from the outset with this estate, and from the outset employed in its management. L. D. Howell then took this fund on the death of Maria John as a mere temporary custodian. It was his duty not to turn it over to the second life owner, his wife, until she gave security for the protection of the remaindermen. This she never did. No administrator with the will annexed of Simon John was appointed, and consequently there was no person to whom he could lawfully pay it over. His duty was to continue to hold it, and in the absence of evidence to the contrary, I must assume that he did so. If there were any question in my mind as to whether this assumption was permissible, it would be set at rest by authority. "The legal presumption from a finding that assets of a decedent had come into the hands of a deceased executor or administrator, is that they are still in the hands of the executor or administrator of the decedent." (*Matter of Seaman*, 63 App. Div. 53; citing Jessup Surr. Pr. 690; *Matter of Clark*, 119 N. Y. 427; *Perkins* v. *Stimmel*, 114 id. 359.) We have seen that the funds in suit came into the hands of L. D. Howell, the administrator of Maria John, and the legal presumption, in the absence of all evidence on the subject, is that they remained in his hands, and passed on his death into the possession of his executrix, Lydia Howell. This is quite consistent with the evidence of the witness Mrs. Bullock, who testified to conversations with Lydia Howell, in which the latter said that she had property belonging to the Simon John estate, aside from the farm, and that it would go to the Hugheses after her death. These admissions on Mrs. Howell's part are unnecessary to establish the case for the answering defendants. The legal presumption, above referred to, together with the other practically undisputed facts does that, but they are exceedingly instructive as corroborating the conclusion that the fund eventually passed into Mr. Howell's hands and as showing that she was aware of that fact. Plaintiff's theory seems to be, *first*, that Maria John expended this fund in her lifetime, and, *second*, that even if she did not that it was divided among the persons entitled to it by her administrators after her death. The first point I have already considered and disposed of by finding on evidence, which seems to me to be controlling, that she did not so expend it. The second point plaintiff contends is established by the evidence of Thomas J. Davies as to a conversation had by him with Edward Hughes, one of Mrs. John's administrators. His evidence is as follows: "Mr. Hughes first said he was sorry that there was hard feeling existing between the two branches of the family, and he told me that it arose from the division of the estate of Maria John. I asked him what the estate was, he replied, what was left from the Simon John estate to his wife Maria John. He further stated that he was one of the administrators with L. D. Howell; that the balance of the estate, that is, what was left at Maria John's death, had been divided up and all parties had had their share. * * * He said that the property had been equally divided and that there was due himself and family, that is, his brothers and sisters, the so-called farm in Marcy; that under the will of Simon John that Mrs. Howell, Aunt Lydia, was to have the use of it as long as she lived, then it was to go to our side

* '47.

of the family." To me this statement of Edward Hughes seems entirely consistent with defendant's contention, while it falls short of sustaining the theory of the plaintiffs. He apparently did not fully understand the situation, for he says that the estate of Maria John was "what was left from the Simon John estate," and the division which he speaks of, I am convinced, was the division of the Maria John estate which actually took place, and not any division of the *corpus* of the Simon John estate which Maria had had for life. Apparently he had forgotten about this, or failed to refer to it, if, indeed, he ever fully understood the situation. His description of what was done is just what might have been expected from a man of very meagre business experience who had permitted his more competent co-administrator to attend to the details which he did not wholly grasp, and on the whole strongly confirms my belief that he never actually took possession of the fund of $2,962.98. I cannot feel that this evidence, especially when taken in connection with the other evidence in the case, would sustain a finding that the fund was divided between the owner for life, Mrs. Howell, and the remaindermen, the Hugheses, by mutual agreement. The case has been tried throughout on the theory that the answering defendants, the descendants and next of kin of the original remaindermen, are entitled to recover the fund, if it can be traced, without the intervention of personal representatives of their parents. I am relieved from passing on this question by the stipulation of the parties and, as I believe that the fund came into the possession of the plaintiff's testatrix, I have directed judgment accordingly.

Samuel Packard, Respondent, v. Levi Elsohn, Appellant, Impleaded with Gates E. Rosenthal and Others.— Order modified and motion for leave to file exceptions *nunc pro tunc* granted, without costs, in accordance with memorandum filed with the clerk. All concurred, except McLennan, P. J., not sitting.— The following is a copy of the memorandum filed with the clerk.

MEMORANDUM of decision: The order of the Special Term granted August 1, 1903, is hereby modified by striking out that part which refuses to allow the appellant to serve and file exceptions to the report of the referee *nunc pro tunc*, and by inserting therein that leave to file and serve such exceptions is hereby granted, and as so modified affirmed, without costs of this appeal to either party. Said exceptions are to be served and filed within five days after entry of the order herein provided for. That part of the order of the Special Term granted September 5, 1903, which denies the defendant's application for the renewal of the motion for an order to file such exceptions is stricken out. If the respondent declines to supply the appellant with necessary exhibits a motion to obtain the same may be made at Special Term. The printed record is to be filed and served on or before the 27th day of February, 1904. The form of the order to be settled by and before Mr. Justice Spring upon two days' notice. All concurred, except McLennan, P. J., not sitting.

George W. Hill, as Administrator, etc., of Henry Hill, Deceased, Plaintiff, v. William J. Conners and Western Transit Company, Defendants.— Plaintiff's exceptions overruled, motion for new trial denied, and judgment ordered for the defendant* on the verdict, with costs. All concurred.

In the Matter of the Voluntary Dissolution of the Rogers Construction Company. John F. Burke, as Receiver of the Rogers Construction Company, Appellant, v. German-American Bank of Tonawanda, Respondent.— Order affirmed, with ten dollars costs and disbursements. All concurred.

Edward F. Cole, Respondent, v. Daniel McAuley, Appellant.— Judgment and order affirmed, with costs. All concurred.

Thomas H. Parvis, Respondent, v. Erie Preserving Company, Appellant.— Judgment reversed and new trial ordered, with costs to the appellants* to abide event, upon questions of law only, the facts having been examined and no error found therein. Held, that the trial court committed error in holding, as matter of law, that the hiring was for the season of 1901. All concurred.

Frances C. Munson, Respondent, v. Perry Morgan, Appellant.— Judgment affirmed, with costs. All concurred.

The Mutual Life Insurance Company of New York, Respondent, v. Frank P. Crouch and Others, Appellants.— Judgment affirmed, with costs. All concurred.

Hollen W. Rich, Respondent, v. Virgil E. Bailey and Elizabeth G. Mayer, as Executors, etc., of Charles Mayer, Deceased, Appellants.— Judgment and order affirmed, with costs. All concurred.

Woods Motor Vehicle Company of Buffalo, Respondent, v. James B. Brady, Appellant.— Judgment affirmed, with costs. All concurred.

Thomas Shaw, Respondent, v. Emanuel Bronner, Appellant.— Judgment affirmed, with costs. All concurred.

Catharine T. Kelly, Respondent, v. The Town of Verona, Appellant.— Judgment and order affirmed, with costs. All concurred.

Samuel P. Lacell, Appellant, v. The Travelers' Insurance Company, Respondent.— Order affirmed, with costs. All concurred.

Ellen Whiting, Appellant, v. The Town of Hartsville, Respondent.— Judgment and order affirmed, with costs. All concurred.

In the Matter of the Summary Proceedings of Christopher Volkman, Landlord, Respondent, v. George W. Hayes, Tenant, Appellant. —Order affirmed, with costs. All concurred.

Louis Adolf Redell, Appellant, v. Charles Redell, Respondent.— Order affirmed, with costs. All concurred.

John C. Carey, Respondent, v. Noah C. Beachey, Appellant.— Judgment and order reversed and new trial ordered, with costs to the appellant to abide event upon questions of fact, unless the plaintiff stipulates that the judgment may be modified by striking therefrom, as of the date of the rendition of the same, the sum of $129.75, with interest thereon from May 30, 1902, in which case the judgment as so modified and the order are affirmed, without costs of this appeal to either party. Held, that the trial justice having charged, in effect, that the plaintiff could not recover the value of the plum trees if they were affected with "black heart," as claimed by defendant, the verdict of the jury necessarily involving the finding that they were not so affected, was against the weight of the evidence. All concurred.

Margaret Mallery and Others, Appellants, v. William Facer and Others, Respondents, Impleaded with George S. Benjamin and Others, Appellants.— Judgment and decision modified by striking therefrom the direction to the referee to make whatever apportionment is necessary upon the premises based upon the last assessed valuation thereof by the town assessors, and leaving such apportion-

* *Sic.*

ment to be based upon the value of said premises, to be ascertained by the referee, and as so modified affirmed, with costs of this appeal. All concurred, except McLennan, P. J., who voted for reversal of the judgment upon the ground that it should have directed that contribution be made by the defendants in inverse order of alienation.

Blanche Beckwith and Others, Infants, by Orrin O. Beckwith, their Guardian ad Litem, Respondents, v. The New York, Chicago and St. Louis Railroad Company, Appellant.— Judgment and order affirmed, with costs. All concurred.

Village of Bolivar, Appellant, v. The Pittsburg, Shawmut and Northern Railroad Company and Another, Respondents.— Motion for reargument denied. Motion for leave to appeal to the Court of Appeals granted, the form of the order and questions to be certified to be settled by and before Mr. Justice Williams on two days' notice.

Nettie M. Whaley v. Erie Railroad Company. —Motion for leave to appeal to the Court of Appeals granted, and certificate made pursuant to section 191 of the Code of Civil Procedure.

Andrew J. Reese v. Halsey F. Northrup.— Motion for leave to appeal to the Court of Appeals granted. Order to be settled by or before Mr. Justice Hiscock on two days' notice.

Emma Cooper, as Administratrix, v. New York, Ontario and Western Railway Company.—Upon reargument of motion to amend the original decision by this court, it is ordered that the order made by this court October 27, 1903, amending the original decision be vacated and set aside and the original motion to amend denied, leaving the decision and order of reversal made by this court standing as originally made. No costs allowed to either party.

Charles J. Pate, Respondent, v. Augustus E. Maxwell, Appellant.— Judgment affirmed, with costs. Held, that it not appearing that the case upon appeal contains all the evidence and proceedings upon the trial, it must be assumed that there is sufficient evidence to sustain the findings of the referee. All concurred.

Addison A. Keeler, Respondent, v. Rome, Watertown and Ogdensburg Railroad Company, Defendant, and The New York Central and Hudson River Railroad Company, Appellant.—Judgment affirmed, with costs. All concurred.

Luzerne A. Todd, Respondent, v. The Municipal Telegraph and Stock Company, Appellant.—Order affirmed, with ten dollars costs and disbursements. All concurred.

Addie Hodge, Respondent, v. Charles Elsworth Hodge, Appellant.—Order reversed and motion denied, without costs in this court or in the court below upon condition that the defendant, at plaintiff's election, enter into a stipulation discontinuing this action, without costs, and without prejudice to the plaintiff's right to renew this motion upon new affidavits. Held, that the papers contain no competent evidence of adultery upon the part of the defendant, and the defendant denying such adultery, there is no reason to believe the plaintiff will be successful in her action. 2. That the papers show that the plaintiff is strong and in good health, accustomed to work; that she has no children, and that her husband has given her one-half of his property, and, therefore, there is no reason for compelling defendant to furnish her alimony or counsel fee to enable her to prosecute her action. All concurred.

Charles N. Rapp, Respondent, v. William B. Ash and Lillian Ash, Appellants.— Order reversed, with ten dollars costs and disbursements, and motion to vacate warrant of attachment granted, with ten dollars costs. Held, that the affidavit presented upon the application for the warrant of attachment did not so establish that the defendants had left the State with intent to defraud their creditors and to avoid service of summons, as to give the justice jurisdiction to grant said warrant; that the allegations upon said subject in form purport to be made upon personal knowledge alone, and it appears that affiant could not have had such personal knowledge. All concurred.

The People of the State of New York, Appellant, v. Louis Windholz, Respondent.— Order affirmed, with ten dollars costs and disbursements. All concurred.

Christian Feigenspan v. Ada Plaisted and Another.—Motion to dismiss appeal granted, with ten dollars costs.

Annie Welch v. Syracuse Rapid Transit Railway Company.— Motion for leave to appeal to the Court of Appeals denied, with ten dollars costs.

Patrick Carey, Appellant, v. The New York Central and Hudson River Railroad Company, Respondent.— Judgment affirmed, with costs. All concurred.

Catherine Stirling, Respondent, v. Matthias J. Kelley, Appellant, Impleaded with Others. — Order affirmed, with costs. All concurred.

Town of Skaneateles, Appellant, v. C. Julia Rodger and Another, etc., Respondents.— Motion to dismiss appeal granted and judgment affirmed, with costs. All concurred. Hiscock, J., not sitting.

In the Matter of the Judicial Settlement of the Accounts of Edward F. Fenton, as, etc.— Motion to dismiss appeal granted, with ten dollars costs.

Margetta James v. Village of Dexter.— Motion for leave to appeal to the Court of Appeals denied, with ten dollars costs.

Albert O. Benjamin, Respondent, v. Olean Street Railway Company, Appellant.— Judgment and order affirmed, with costs. All concurred, except Williams, J., dissenting.

Charles M. Warner, Respondent, v. Louis House, Appellant, Impleaded with Syracuse, Lakeside and Baldwinsville Railway and Others.— Order affirmed, with costs. All concurred.

The People of the State of New York, Respondent, v. Herbert Elliott and William Elliott, Appellants.—Judgment of conviction affirmed. All concurred.

Charles R. Finch, Appellant, v. Emmett Patterson and Others, Respondents.— Judgment affirmed, with costs. All concurred.

Lewis Bennett, Respondent, v. Iron Clad Manufacturing Company, Appellant.— Judgment and order affirmed, with costs. All concurred.

Mary F. Duffy, an Infant, by Frank Duffy, her Guardian ad Litem, Respondent, v. The City of Lockport, Appellant.— Judgment and order affirmed, with costs. All concurred, except Spring, J., not sitting.

Nellie Burick, Respondent, v. Erie Railroad Company, Appellant.— Judgment and order affirmed, with costs. All concurred. Hiscock, J., not sitting.

In the Matter of the Proposed Extension of Harter Street, in the Village of Herkimer. Standard Furniture Company, Appellant; The Village of Herkimer, Respondent.— Judgment and order affirmed, with costs. All concurred.

Estella D. Kirby, Appellant, v. Charles W. Kirby, Respondent.— Judgment and order affirmed, with costs. All concurred.

County of Niagara, Respondent, v. Fidelity and Deposit Company of Maryland, etc., Appel-

lant.—Motion for leave to appeal to the Court of Appeals denied, with ten dollars costs, upon the merits, without determining whether under the provisions of section 191, Code of Civil Procedure, it is necessary to obtain leave to appeal to the Court of Appeals from the decision of this court herein.

Michael Crage, Respondent, v. International Railway Company, Appellant.—Judgment reversed and new trial ordered, with costs to the appellant to abide event. Held, that the evidence establishes that the overcharge or refusal by defendant's conductor to issue to the plaintiff a transfer was the result of inadvertence or mistake, not amounting to gross negligence, and, therefore, the plaintiff is not entitled to recover. All concurred.

Margaret Armstrong, Respondent, v. Webster P. Moore and Others, as Executors, etc., of Matthew O'Neill, Deceased, Appellants.—Judgment and order affirmed, with costs. All concurred.

Peter De Lette, Respondent, v. Albert W. Deming, Appellant.—Judgment and order reversed and new trial ordered, with costs to the appellant to abide event, upon questions of law only. Held, that there was no sufficient proof of damages authorizing the verdict rendered. All concurred.

William Holloran, Respondent, v. Buffalo, Rochester and Pittsburg Railway Company and Others, Impleaded with The Rochester and Pittsburg Coal and Iron Company, Appellant.—Judgment and order reversed and new trial ordered, with costs to the appellant to abide event, upon questions of law only. Held, that the verdict necessarily finding that the machine in question was being operated by the defendant at the time of the accident, was against the weight of the evidence. All concurred.

Charles A. Jacques and Anna Jacques, his Wife, Appellants, v. Delos Jacques and Flora Jacques, his Wife, Defendants, Impleaded with Mattie A. Jacques, Respondent.—Judgment and order overruling the demurrer to the second defense set forth in the answer reversed, with costs, and judgment ordered sustaining the demurrer, with costs, with leave to the respondent to plead over upon payment of the costs of the demurrer and of this appeal. Held, that the respondent, not being a judgment creditor of her husband, is not entitled to attack the transfer from him to his two sons of the property sought to be partitioned. All concurred.

Hattie Day, Respondent, v. Village of West Carthage, Appellant.—Judgment and order affirmed, with costs. All concurred.

Frederica Studeman, Appellant, v. John George Becker and Others, Respondents.—Order affirmed, with ten dollars costs and disbursements. All concurred.

Frank W. Smith, Respondent, v. American Locomotive Company, Appellant.—Order reversed, with ten dollars costs and disbursements, and motion granted requiring the plaintiff to serve a bill of particulars and items showing the respects and particulars in which the steam hammer in question was or had become defective, and in which the same was improperly constructed or out of repair, with ten dollars costs to abide the event of the action. All concurred, except Williams, J., dissenting.

Peter F. Schapp, Respondent, v. Sherman Bloomer and Charles Bloomer, Appellants.—Judgment and order affirmed, with costs. All concurred, except Williams, J., who dissented upon the ground of error committed by plaintiff's counsel in his statements to the jury respecting insurance against loss and also upon the ground that the plaintiff assumed the risk.

Ceylon H. Lewis and Another, Respondents v. Helen J. Snook, Appellant.—Motion for leave to appeal to the Court of Appeals granted.

Samuel Packard, Respondent, v. Levi Elsohn, Impleaded, etc., Appellant.—Motion to dismiss appeal denied, without costs, and appeal placed upon motion calendar for argument on Friday, January 22, 1904.

In the Matter of Sarah L. Van De Carr and Others, as, etc., v. Frank P. Crouch.—Motion to dismiss appeal granted, with ten dollars costs, unless appellant, within twenty days, prepares, files and serves printed papers upon appeal and pays ten dollars costs of motion, in which event the motion is denied.

In the Matter of the Final Judicial Settlement of the Account of Anna M. C. Wilkin, as Trustee under the Last Will and Testament of James Cunningham, Deceased.—Decision and order of this court herein amended so as to direct a new trial of the issues, upon condition, however, that any party to the proceeding have leave, upon such new trial, to read from the stenographer's minutes of the former trial the testimony of such witnesses as they may severally desire, and also that the trustee, at her own proper cost and expense, furnish security for the fund, or make such other provision for its safety as shall be agreed upon by the parties, subject to the approval of the court. The order to be settled by and before Mr. Justice Williams at his chambers on Thursday morning, January 21, 1904, at ten o'clock.

Clark D. Hawley, Respondent, v. Elizabeth B. Thayer, Appellant.—Appeal dismissed, with costs, together with ten dollars costs of this motion, unless, within twenty days, appellant serves and files the printed record upon appeal and pays the ten dollars costs of this motion, in which event the motion is denied, without costs.

Matthew J. O'Donnell, Appellant, v. The New York Central and Hudson River Railroad Company, Respondent.—Judgment and order reversed and new trial ordered, with costs to the appellant to abide event. Held, that the question of defendant's negligence, plaintiff's freedom from negligence, and whether the plaintiff at the time of the accident was engaged in the line of his duty, were questions of fact for the jury. All concurred, except Spring and Stover, JJ., dissenting.

John Splain, Appellant, v. Utica Gas and Electric Company, Respondent.—Judgment reversed and new trial ordered, with costs to the appellant to abide event. Held, that the question of defendant's negligence was one of fact for the jury; also, held, that the plaintiff was not barred from recovery by reason of the fact that he did not own the fee of the land upon which the tree stood. (See *Donahue* v. *Keystone Gas Co.*, *ante*, p. 386.) All concurred.

Francis E. Farquahar, Appellant, v. Maurice H. Osborne and Susan Fraser, Respondents.—Judgment affirmed, with costs. All concurred.

Frances Hartman, Respondent, v. The New York Central and Hudson River Railroad Company, Appellant.—Judgment and order affirmed, with costs. All concurred.

John W. Rogers and Peter A. Ward, as Trustee in Bankruptcy of John W. Rogers, Respondents, v. The New York Central and Hudson River Railroad Company, Appellant.—Judgment and order affirmed, with costs. All concurred.

Loren M. Hewitt, as, etc., v. Verner J. Hedden.—Motion for reargument denied, with ten dollars costs.

Emmett A. McManus v. John G. Elbs.—Motion to amend remittitur denied, without costs.

Mary Faller v. Eliza Richardson, as, etc.— Motion to dismiss appeal denied, without costs, without prejudice to the right to renew upon sufficient papers.

Ralph C. Farnsworth v. The New York Central and Hudson River Railroad Company.— Motion for leave to appeal to the Court of Appeals denied, with ten dollars costs.

Augustus Leisten, Respondent, v. Anna Corning, Appellant.— Judgment and order affirmed, with costs. All concurred.

Eleanora Wiley, Respondent, v. Isaac T. Farrand and Janette Farrand, Defendants, Impleaded with Edrick H. Farrand, Appellant.— Judgment affirmed, with costs. All concurred, except Stover, J., dissenting.

Joshua E. Champlin and Alice V. Champlin, Appellants, v. John Parker, Respondent.— Judgment and order affirmed, with costs. All concurred.

George R. Searle and Others, in Their Own Behalf and All Others Similarly Situated Who May Come in and Prosecute This Action and Share the Expense, Appellants, v. The Corporation Liquidating Company, Respondent.— Interlocutory judgment affirmed, with costs, with leave to the plaintiff to plead over upon payment of the costs of the demurrer and of this appeal. All concurred.

Daniel F. Sullivan and John J. Dunn, Respondents, v. Harry B. Grems, Defendant, and Clinton W. Rider, Appellant.— Judgment and order affirmed, with costs. All concurred.

Emma E. Guiles v. Village of Cattaraugus.— Motion for reargument denied, with ten dollars costs.

Douglass W. Meyer, v. Isaac Meyer and Another.— Motion for reargument denied, with ten dollars costs.

Margaret E. Sheldon v. Town of Allegany.— Motion for leave to appeal to Court of Appeals for certificate of question denied, with ten dollars costs.

Emma J. Wells, Respondent, v. The New York Central and Hudson River Railroad Company, Appellant.— Judgment and order reversed and new trial ordered, with costs to the appellant to abide event, unless the plaintiff stipulates to reduce the verdict to the sum of $3,500, as of the date of rendition thereof, in which event the judgment as so modified and the order are affirmed, without costs of this appeal to either party. All concurred.

Caro Wilhelm, Respondent, v. Emil Wilhelm and Minnie Wilhelm, Appellants.— Judgment and order affirmed, with costs. All concurred, except Stover, J., dissenting, and McLennan, P. J., not sitting.

James H. Callopy, Appellant, v. The Village of Tonawanda, Respondent.— Order affirmed, with costs, upon the ground that the trial justice properly exercised his discretion in setting aside the verdict as against the weight of the evidence. All concurred.

Lottie Phillips, Respondent, v. Frank Fuller and Others, Appellants.—Judgment affirmed, with costs. All concurred.

J. G. Diffenderfer Company, Respondent, v. The Importers and Traders' National Bank of New York, Appellant.— Order reversed and motion for interpleader granted upon condition that within thirty days the defendant procure the Bank of Arizona and Colvin to appear and plead in this action, and give security to plaintiff for any costs which may be awarded against such parties; in which event and upon payment of the fund in dispute into court, the defendant is discharged as defendant, and the parties so interpleading are substituted in its stead. In case of failure of compliance with the above provision, the order is affirmed, with costs. The form of the order is to be settled by and before Mr. Presiding Justice McLennan on two days' notice. All concurred.

David D. Augsbury, as Administrator with the Will Annexed of Sarah Ann Roof, Deceased, Appellant, v. Loren F. Shurtliff, Respondent.— Judgment affirmed, with costs. All concurred.

Sarah A. Spalding, Respondent, v. The Supreme Council, Royal Templars of Temperance, and Others, Appellants. — Judgment modified so as to provide that there be paid out of the fund to the appellants Mary Jane Beadle and Ira E. Huie, the sum of one hundred and ninety-eight dollars and fifty cents ($198.50), dues and assessments paid by them to the association upon the certificate, and also to the defendant Ira E. Huie, the sum of five hundred dollars ($500) as beneficiary under the original policy or certificate, and the remainder of the two thousand dollars ($2,000) to the plaintiff; and as so modified affirmed, without costs of this appeal to either party. All concurred.

The People of the State of New York, Respondent, v. Andrew Zimmerman, Appellant. — Judgment affirmed, with costs. All concurred.

Catharine Stirling, v. Bridget Kelley, as, etc. — Motion for leave to appeal to the Court of Appeals granted. Questions to be certified to the court to be settled by and before Mr. Justice Spring upon two days' notice.

James H. O'Brien, Respondent, v. The Victoria Paper Mills Company, Appellant. — Judgment and order reversed and new trial ordered, with costs to the appellant to abide event, upon questions of law only, the facts having been examined and no error found therein. Held, that the evidence fails to establish that the defendant was guilty of negligence which was the proximate cause of the injury. All concurred.

Morris Brown, Appellant, v. Dutchess County Mutual Insurance Company of Poughkeepsie, Respondent.— Judgment affirmed, with costs, upon opinion of Rumsey, J., in same case, reported, 64 Appellate Division, 9. All concurred.

Katherine Coulson and Others, Appellants, v. Bernard G. Flynn, Respondent, Interpleaded by the Supreme Council of the Catholic Mutual Benefit Association.— Judgment affirmed, with costs, upon opinion of Kenefick, J., delivered at Special Term. All concurred. (Reported in 41 Misc. Rep. 186.)

Traders' National Bank of Rochester, Respondent, v. Moses Shire, as Administrator, etc., of John Hamilton, Appellant.— Judgment and order affirmed, with costs, upon the opinion of this court in *Flour City National Bank* v. *Shire* (88 App. Div. 401). All concurred.

THIRD DEPARTMENT, JANUARY, 1904.

Jeremiah Crowley, Appellant, v. The State of New York, Respondent.— Judgment reversed on law and facts and new trial granted, with costs of this appeal to appellant.— Appeal from a judgment of the Court of Claims dismissing the appellant's claim against the State.—

PARKER, P. J.: It seems to be conceded that

the leak of which the claimant complains actually exists in the canal, and has so existed since 1897, when the State caused the towpath to be straightened; and there is no real dispute but that it so exists because of negligence on the part of the State. There is a difference in the evidence as to the extent of the leak, the claimant making it as much as ten quarts every two minutes, and constantly running during the season of navigation, and the defendant's witnesses saying it was very little. It seems that the State, instead of trying to stop the leak itself, caused a trench to be dug along the foot of the bank where the leak came through, some two and one-half feet wide and two feet deep, upon claimant's land to receive the water and lead it into another ditch running off easterly across the plaintiff's land, and which he had long ago made for another purpose. By so doing the State intended to prevent the water from injuring the claimant's land, and claims that it has done so. Such ditch was dug with the claimant's consent, but he claims that it has not prevented the water from doing him serious injury. The decision of the court below seems to be based upon the theory that, although the water does leak out of the canal owing either to the negligent construction thereof or the negligent omission to repair it, yet it flows into that ditch, and as a matter of fact does the claimant no harm. The claimant has twenty acres along the canal and between it and the Delaware and Hudson railroad bank. It is a low lying piece of land, consisting of muck from eight inches to two feet in depth over a hard clay subsoil impervious to water, particularly adapted to the raising of potatoes when it can be kept dry. His explanation is that the water which flows into the said ditch cannot sink through the clay bottom; that the ditch has a very slight grade and is easily filled up with growing vegetation, so that the water does not readily flow through it; that hence it spreads over the hard clay bottom and is absorbed by the muck land, which is thus constantly kept wet and his crop of potatoes thereby ruined. His claim is that it so injured seven acres of the twenty in each of the years 1899 and 1900 and reduced the crop thereon one-half, amounting in all to some $1,000 at market rates. It is true that no one testifies as to the condition of the soil on that seven acres in contradiction of the claimant, and no one contradicts his statement that not more than one-half a crop was taken therefrom, yet I cannot credit his statement that so large an extent as seven acres was affected by the water which he himself says leaked from the canal onto his premises. I cannot credit that the amount, even as he estimates it, was sufficient to have the effect that he states; and I do not think that the Court of Claims was obligated to accept as correct his estimate, either as to the amount of water or as to the amount of land injured. But it seems to me that, on the undisputed evidence, it is easy to understand that a strip of land along that ditch so far as it extended on claimant's premises was rendered wet and unfit to produce a good crop of potatoes. To a certain extent the story is reasonable, and I do not know that we have the right, upon the evidence before us, to entirely reject the claimant's evidence as to the manner in which the water affected that muck land after it got into the ditch, and particularly if it stood there. The plaintiff is contradicted as to the amount of water that daily leaked onto his premises, but the evidence of those so contradicting him does not assume to give any estimate as to how much it was. They say it was a small amount. That conveys so little information that it hardly amounts to a contradiction. In all other respects the claimant's story is substantially uncontradicted. I am of the opinion that we have no right to entirely discredit his whole statement and hold that he has failed to prove any damage whatever resulting from the leakage which it is conceded exists there. It may be very difficult to determine just how much land was injuriously affected by the water, but under the evidence I do not know upon what theory we can say that none whatever was so affected. As long as the State permits the water to leak onto his premises it should expect to pay for the annual damage caused thereby, and should be prepared to furnish some evidence of what the actual effect of such water is upon the land and the crops of the party upon whom it is so deliberately and constantly trespassing. I am of the opinion that, on the evidence, some damages should have been awarded to the claimant, and that an utter dismissal of his claim was error. The judgment should be reversed and a new trial granted. All concurred.

Benjamin Langto, as Trustee of School District No. 23, of the Town of Mooers, Respondent, v. Luke Raymond, Appellant.—Judgment of the County Court and Justice's Court reversed, with costs in this court and in the court below.—Appeal by the defendant from a judgment in favor of the plaintiff, entered in the Clinton county clerk's office. Luke Raymond, the father of the defendant, on October 25, 1875, conveyed to school district No. 23, in the town of Mooers, in Clinton county, a small parcel of land for the price of twenty dollars. It was sold for a schoolhouse site, and a condition of the conveyance was that if a schoolhouse was not built upon it, no other building should be, and that the grantor, or his heirs, might have it again upon payment of the purchase price. A schoolhouse was built upon the lot. About five years ago the defendant took possession of such house and lot and offered the supervisor of the town twenty dollars for it. The offer was refused. No school was then held in the building, nor has any been held there since. There has been no trustee elected in the district for the five years prior to December, 1902. In that month, Langto, claiming to have been elected trustee of such district, notified the defendant to remove from such premises, and, upon his refusal to do so, instituted proceedings to eject him therefrom under subdivision 4 of section 2232 of the Code of Civil Procedure. The justice rendered a final order in such proceedings, that the plaintiff have possession of the premises, and for costs against the defendant. An appeal was taken therefrom to the County Court, where such order was affirmed, and from such judgment of affirmance this appeal is taken.—

PARKER, P. J.: It may be conceded that school district No. 23 was regularly organized and in existence when the conveyance to it of the premises was made in 1875, and I will concede, without deciding, that the title to such premises thereby became vested in the district, as averred in the petition. On July 1, 1897, however, the school commissioner, Duffy, made and filed in the proper office an order declaring such school district dissolved, and adding a certain specified part thereof to school district No. 15, and the balance thereof to school district No. 3, and directing that such order should take effect August 1, 1897. Commissioner

Duffy had the right under the statute to make such dissolution, and it does not seem that he was obliged to take any other steps to effect it. (See Laws of 1894, chap. 556, tit. 6, § 9, as amd. by Laws of 1896, chap. 264.) Since then the use of such district No. 23, as a school district, has been practically abandoned. Part of its territory was merged with and has since been utilized by district No. 15, and the children resident therein attended school in the latter district. The rest of its territory has, during the same period, been utilized by district No. 8, and the children therein resident attended school in that district. No trustee was thereafter elected in district No. 23 until the proceeding taken by Langto, hereinafter referred to. What proceedings were taken, if any, to sell the property of district No. 23, and to pay its debts, as provided for in sections 10-12 of such act,* does not appear, although the fact that this defendant offered to purchase the premises from the supervisor indicates that he was then supposed to have that matter in charge, as he was by section 10 required to do. If, as I think we must, we assume that district No. 23 was regularly dissolved, then the person who was its trustee in August, 1897, was still its trustee, holding over under the explicit provisions of section 12; and, in the absence of any proof that, by his death or otherwise, such office has become vacant, Langto could not be lawfully elected a trustee of the district. But more than that, the evidence utterly fails to show a regular and duly authorized election by such district in December, when he claims to have been elected. By an order made December 8, 1902, O'Neil, as school commissioner, undertook to create and form a new school district out of districts Nos. 15 and 8; that is, he attempted to recreate the one that Duffy dissolved. No consent of the trustees of such districts was ever obtained, as section 2 of title 6 of the statute required, and hence that effort was inoperative. He also then authorized Provincia, a voter in the district, to notify all voters therein, as required by sections 1 and 2 of title 7, that a school meeting would be held in such district, so created, on December sixteenth, at seven-thirty P. M., for the purpose of electing officers for such district. But, as he failed to create such new district, no election could be lawfully held for the same. It is claimed, however, that the old district was in fact never dissolved; and that although five years had passed without electing a trustee, yet O'Neil, as school commissioner, could, under the provisions of section 9 of title 7 of the Consolidated School Law, order Provincia to give notice to the inhabitants of the old district for an election of officers thereof, the same as if it had never in fact been abandoned. If the old district had never been dissolved, it had been in fact abandoned and was evidently not in the situation referred to in such section 9. But if it were, the notice so required to be given is a six-day notice in writing, and one which the commissioner shall himself prepare and deliver to the voter who is to serve the same. (See sections 1 and 2 of such title.) The evidence does not show that Provincia served any such notice, nor that he served any notice six days before the sixteenth. He says he served a notice of meeting on all the taxpayers from the tenth to the twelfth of December. Whether he served more than one on the tenth does not appear. Whether he received it from O'Neil does not appear. What it contained does not appear. There is nothing to show that the notice which he gave purported to come from O'Neil, or that it contained on its face any suggestion whatever that such a district as No. 23 was yet in existence, or that there were any officers to be elected therein. Nor does it appear that any considerable number of the inhabitants of the old territory of No. 23 attended at such meeting. He testifies that Langto was then elected trustee, but he strenuously refrains from producing any record of the votes, or of stating anything more that was done there. I conclude that the evidence does not show a regularly held meeting at which Langto was elected trustee. It is apparent from the evidence that there has been no effort or purpose on the part of districts Nos. 15 and 8 to have No. 23 again carved out of their territories; and the election of a trustee of such district upon whom very important powers would be thereby imposed, should not be recognized unless the proceedings under which it is done are strictly those which the statute requires. But, moreover, in directing Provincia, O'Neil did not assume to be acting under section 9† and the notices which Provincia gave do not appear to be sufficient under that section. Langto, therefore, cannot be held to be a trustee of school district No. 23, and he had, therefore, no authority to inaugurate on its behalf the proceedings in question. The application in such proceedings must be made by "the person lawfully entitled to the possession of the property intruded into or squatted upon." (Code Civ. Proc. § 2235.) If school district No. 23 held the title and had never been dissolved, its lawfully elected trustee would be the one who was entitled to such possession (Tit. 7, § 47),‡ and Langto was not that trustee. If it was lawfully dissolved by Duffy, as it clearly seems to have been, evidently Langto is not its trustee; and, inasmuch as in that event it became the duty of the supervisor to sell the property, it would seem to be his duty to give possession of the same. In any event Langto has not shown himself entitled to the possession of the property, and hence should not have maintained these proceedings. The judgment of the County Court and of the justice must be reversed, with costs. All concurred.

Jennie L. Coons, as Executrix, etc., of Derrick G. Golder, Deceased, Respondent, v. John Sanguinetti, Appellant.—Judgment reversed and new trial granted, with costs to appellant to abide event.—Appeal by the defendant from a judgment of the Supreme Court, entered in the clerk's office of the county of Fulton on the 1st day of June, 1903, on a verdict for the plaintiff directed by the court.—CHESTER, J.: The action was brought to recover for an amount remaining unpaid upon a piano contract between the defendant and one Mary E. Tietz which had been transferred to the plaintiff's testator, Derrick G. Golder. The amount claimed in the complaint to be due was the sum of two hundred and one dollars and eighty-seven cents besides interest. The court directed a verdict for the plaintiff for the full amount claimed. In the answer it was alleged that there had been an account stated between the defendant and Golder under the contract in question under which a balance of only seventy-five dollars was

* Laws of 1894, chap. 556, tit. 6, §§ 10-12.—[REP.

† See Laws of 1894, chap. 556, tit. 7, § 9.—[REP.

‡ See Laws of 1894, chap. 556, tit. 7, § 47, subd. 6.—[REP.

due from the defendant thereon, and it was also alleged "that the entire amount of said contract had been paid except seventy-five dollars." The evidence given in support of the defendant's allegation of an account stated was all given by defendant's wife and was to the effect that there had been a dispute between the parties over the amount due; that the defendant claimed it was only from fifty dollars to sixty dollars and Golder that it was over one hundred dollars; that the defendant offered to pay seventy-five dollars to settle when Derrick brought a receipt to defendant's wife; that he never brought such receipt and that the defendant never paid the money. This evidence shows an unsuccessful effort to compromise the claim rather than an adjustment of the accounts that could fairly be regarded as an account stated. But under the allegation of payment a different situation is presented. The defendant's wife testified in his behalf that Golder had said upon the occasion when they were having the dispute over the amount due on the contract, that the amount unpaid was seventy-five dollars. This testimony was entirely undisputed by any direct evidence. It is true that she made a statement inconsistent with this when she testified that he said that the amount due on the contract was over one hundred dollars. It is true also that she was the wife of the defendant and testified in his behalf to a conversation with a deceased person. While these facts required that her testimony should be carefully scrutinized, it was for the jury to determine what, if any, weight should be given to it. With her evidence in the case there was a clear question of fact for the jury to determine as to whether or not all but seventy-five dollars of the contract had been paid, and the direction of a verdict for the plaintiff for the full amount claimed was error which requires reversal. Judgment reversed and a new trial granted, with costs to the appellant to abide the event. All concurred.

George W. Goetz, Appellant, v. The State of New York, Respondent.—Judgment unanimously affirmed, with costs.—Appeal by the plaintiff from a judgment of the Court of Claims, in favor of the defendant, entered in the office of the clerk of said court on the 23d day of September, 1901.—

CHASE, J.: Porter avenue in Buffalo runs nearly north and south and across the Erie canal. Along and parallel with the canal is Third street, but it is indistinguishable from the towpath. Prior to 1897 there was a change bridge over the canal at Porter avenue, and that avenue was graded several feet higher than Third street. Claimant is the owner of an unimproved and unoccupied lot at the corner of said streets being about 113 feet on Third street and 40 feet on Porter avenue. The only way to get upon Porter avenue from Third street was by using the approach to the change bridge. The Legislature by chapter 668 of the Laws of 1894, directed the removal of the old bridge and also authorized and directed the board of park commissioners of the city of Buffalo to construct a new bridge over the canal at said street and the act provided that the State should pay part of the expense and that the city should pay the balance thereof. Nothing seems to have been done under that act and the Legislature, by chapter 590 of the Laws of 1895, authorized and directed the Superintendent of Public Works to construct a bridge with the necessary abutments and approaches over the canal at that point, and provided that the expense be borne equally by the State of New York and the city of Buffalo. A new bridge was erected several feet higher than the old bridge and extending the full width of the street, and the grade of Porter avenue in front of claimant's lot was raised and an abutment or retaining wall approaching said bridge covered a rectangular strip of claimant's lot nineteen feet along Porter avenue and three feet along Third street. On the 28th day of May, 1898, claimant filed with the common council of the city of Buffalo a claim for damages, in which claim he says: "That the floor or roadway of said new bridge was built many feet higher than the bridge which it replaced; that by direction of the park commissioners the grade of Porter avenue in front of claimant's lot was raised and worked to a subgrade of eighteen inches, a line drawn from the floor of the new bridge to the grade established at the junction of Porter avenue with Fourth street; that a temporary macadam pavement with rubble stone foundation, averaging fifteen inches in depth, was constructed on said grade during the summer of 1897, and your petitioner is informed and verily believes that the park commissioners intend to lay an asphalt pavement upon said macadam pavement at the new grade, and that some proceedings have been taken, and further proceedings are about to be taken, by the said commissioners in that respect; that said new grade of Porter avenue is about fifteen feet above the level of claimant's said lot and several feet above the former grade of Porter avenue; that claimant's said lot is inaccessible from Porter avenue by reason of the embankment constructed in front thereof by the city through its park commissioners as aforesaid; that by reason of the matters herein set forth plaintiff's lot has been greatly damaged." The claim was heard by the assessors of the city, as provided by the city charter, and witnesses were sworn by both parties, and said assessors found that the owner had been damaged by the change of grade of Porter avenue, *between Fourth street and Erie canal*, and awarded him $3,200 therefor. The award was accepted by the claimant, and it has been paid to him. On May 24, 1900, a notice was served, as provided by section 70 of the Canal Law (Laws of 1894, chap. 338), showing the quantity and boundary of the lands of the claimant permanently appropriated by the State. The claimant filed this claim with the Court of Claims about December 21, 1898, in which he claims damages for the lands so permanently appropriated and for raising the grade of Porter avenue, and thereby shutting off claimant's approach from Third street to Porter avenue. On the trial in the Court of Claims three witnesses, as to value, were sworn by the claimant. One testified: "I think I knew the value of those premises before the State went in and took possession of it or interfered with it." He then gave his estimate of the value of the premises before and after the improvements were made, and he further testified: "In my judgment, it is reduced more than one-half. It is reduced to $3,500, not simply because they have taken of the nineteen feet, which has always been below the grade of Porter avenue, but they have cut off Third street too. I have taken into consideration the approach into Third street as a part of the damage. The approach into Third street used to be up the tow path." The second witness testified: "My damages are based largely on the damages arising from the change of grade there and the stoppage of the entrance down that way. Fifty per cent all the way around of the diminution

arises from the change of grade. I should judge those lots facing the canal before the improvement were worth about $75 per foot front." The third witness testified: "My estimate of the damage is based upon the fact that Porter avenue has been raised up so high by change of grade and the pier and everything that is there. I understand that the pier and improvement are all in Porter avenue except three feet. My estimate of the damages is based on the improvements there. That is the cause of the damage the raise of grade and all together." It is very clear that said witnesses in estimating the damages included as an element thereof the change of grade and all consequent interference with and to the approaches to the lot. Subsequent to the city changing the grade on Porter avenue from Fourth avenue to the Erie canal as stated claimant owned his lot subject, however, to the right of the city to maintain Porter avenue at a grade that made it inaccessible from the lot or from Third street. The damages occasioned by taking the piece of land nineteen by three feet for the abutment or retaining wall should be estimated in view of its situation after the grade of Porter avenue had been so changed. If the abutment or retaining wall had not been extended over on the claimant's land no liability for damages against the State would exist. The question for the Court of Claims to determine, therefore, was not considered by the expert witnesses and their estimate of the damages was of very little service to the court. If a building is ever erected upon the claimant's lot which extends above the grade of Porter avenue, the State's ownership of the rectangular piece of land under the abutment or retaining wall will not probably interfere with access to such building from the street above its grade line, but even if the State's ownership of such strip of land results in the exclusion of access, light and air even above the grade of Porter avenue the question still remains as to the value of such rectangular piece of land in view of the situation existing after the change of the grade of Porter avenue as stated. The court was left without any expert testimony as to the value of such piece of land as it existed after such change of grade and it was compelled, if at all, to make an award from the general testimony received in regard to values and from the personal view of the members of the court. This they did, and we cannot say that the award is inadequate. The judgment should be affirmed, with costs.

William Bromley, as Administrator, etc., of Edward Bromley, Deceased, Appellant, v. Hudson River Telephone Company, Respondent.— Judgment unanimously affirmed, with costs. No opinion. Houghton, J., not sitting.

Margaret Churchill, Appellant, v. Lawton Caten, Respondent.—Judgment and order unanimously affirmed, with costs. No opinion.

Elmer A. Curtis, Respondent, v. John N. H. Cornell, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion.

Clarissa Weatherwax Conkling, Appellant, v. John T. Weatherwax and Others, Defendants, Impleaded with Hannah M. Hidley, Respondent, and Emily A. Tompkins, Appellant.— Appeal from order dismissed, without costs. No opinion. All concurred.

The Farmers and Mechanics' Bank, Appellant, v. Warren Hawn and Others, Respondents.— Judgment and order unanimously affirmed, with costs. No opinion.

Edward D. Farrell, as Receiver of the Cobleskill Quarry Company, Respondent, v. Patrick Ryan and Mary Ryan, his Wife, Appellants. —Judgment and order unanimously affirmed, with costs. No opinion.

Milton M. Fenner, Respondent, v. Russell J. McDowell, Appellant.— Judgment affirmed, with costs. No opinion. All concurred.

Elwood A. Grissinger, Appellant, v. Alice D. Janser (Formerly Alice D. Devendorf) and Milton Devendorf, as Executors, etc., of De Witt A. Devendorf, Deceased, Respondents.—Judgment unanimously affirmed, with costs. No opinion.

Delina Girard, as Administratrix, etc., of Abel Girard, Deceased, Respondent, v. International Pulp Company, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion.

Lafayette Hill, Appellant, v. Peter M. Martin, as High Chief Ranger of the High Court of New York Independent Order of Foresters, Respondent.— Judgment unanimously affirmed, with costs. No opinion.

George H. Hiscott, Respondent, v. William B. Dillenback, Appellant.— Judgment affirmed, with costs. No opinion. All concurred.

Mary E. Hanrahan, as Administratrix, etc., of James Hanrahan, Deceased, Respondent, v. The Glens Falls Portland Cement Company, Appellant.— Judgment and orders affirmed, with costs. No opinion. All concurred, except Smith, J., dissenting.

Isaac G. King, Respondent, v. The Village of Fort Ann, Appellant.— Judgment and order affirmed, with costs. No opinion. All concurred, except Chase and Houghton, JJ., dissenting.

Mohawk Gas Company of Schenectady, Appellant, v. Charles D. Beckwith, Respondent. — Judgment and order unanimously affirmed, with costs. No opinion.

In the Matter of the Accounting of William Hollands and Elizabeth D. Thomas, as Administrators, etc., of John I. Winne, Deceased, Respondents. Elizabeth McDowell and Others, Appellats; Ammon Winne and Others, Respondents.—Decree unanimously affirmed, with costs payable out of the estate, upon the authority of *Matter of Davenport* (172 N. Y. 454). No opinion.

In the Matter of the Petition of the Mayor and Common Council of the City of Schenectady, under Section 62 of the Railroad Law* and Chapter 376 of the Laws of 1902, as to Changing Certain Grade Crossings of the New York Central and Hudson River Railroad and the Railroad Operated by the Delaware and Hudson Canal Company in that City, from Grade to Undercrossings. Aaron Levi, Appellant; The City of Schenectady and Others, Respondents.— Determination unanimously confirmed, with fifty dollars costs and disbursements. No opinion.

John N. Pierson, Respondent, v. The Delaware and Hudson Company, Appellant.— Judgment and order reversed, on the ground that the damages are excessive, and a new trial granted upon payment of costs of the former trial by defendant, unless the plaintiff stipulate to reduce verdict to $7,000, in which event the judgment and order as so modified are affirmed, without costs of this appeal to either party. No opinion. All concurred, except Houghton, J., who voted generally for reversal.

* See Laws of 1890, chap. 565, § 62, added by Laws of 1897, chap. 754, and amd. by Laws of 1899, chap. 359.— [REP.

The People of the State of New York ex rel. Albert C. Hall and John M. Purdy, as Administrators, etc., of Amos C. Hall, Deceased, Relators, v. Theodore P. Gilman, as Comptroller of the State of New York, Respondent.— Determination of the Comptroller unanimously confirmed, with fifty dollars costs and disbursements. No opinion.

The People of the State of New York ex rel. Western Electric Company, Relator, v. Nathan L. Miller, as Comptroller of the State of New York, Respondent.— Determination of the Comptroller unanimously confirmed, with fifty dollars costs and disbursements. No opinion.

The People of the State of New York ex rel. Elizabeth Smith, Respondent, v. Charles Smith and Others, Appellants.—Order modified by adding thereto "unless or until a guardian of the person of said Helen M. Smith shall be appointed by the Surrogate's Court of Albany county on her petition, in which case this order shall not be operative," and as so modified affirmed without costs. No opinion. All concurred, except Chester, J., dissenting.

Julian Phetteplace, Respondent, v. Smith Lane, Appellant, Impleaded with Menzo Odell.— Judgment reduced to ninety-six dollars and seventy-two cents and as modified affirmed, with costs to appellant. No opinion. All concurred.

The People of the State of New York ex rel. Continental Insurance Company, Relator, v. Nathan L. Miller, as Comptroller of the State of New York, Respondent.– Determination of the Comptroller confirmed, with fifty dollars costs and disbursements. No opinion. All concurred, except Smith, J., dissenting.

The People of the State of New York ex rel. Herbert T. Jennings, as Receiver of the Oneonta, Cooperstown and Richfield Springs Railway Company, Appellant, v. The President, Managers and Company of the Delaware and Hudson Canal Company, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.

Frank M. Starbuck, as Trustee in Bankruptcy of the Estate of Edward T. Patterson, Individually and as Successor of the Firm of Patterson & Lucas, Bankrupt, Respondent, v. Edward T. Patterson, Individually and as Successor of the Firm of Patterson & Lucas, and George A. Patterson, Appellants.— Judgment unanimously affirmed, with costs. No opinion.

Elisha Steadman, Appellant, v. The State of New York, Respondent.—Judgment affirmed, with costs. No opinion. All concurred, except Houghton, J., dissenting.

Minnie Bailey Thompson, Respondent, v. Millard F. Thompson, Appellant.—Judgment and order affirmed, with costs. No opinion. All concurred, except Chase and Houghton, JJ., dissenting.

Town of Manlius, Appellant, v. The State of New York, Respondent.— Judgment affirmed, with costs. No opinion. All concurred, except Houghton, J., dissenting.

The Village of St. Johnsville, Respondent, v. Daniel Smith and Others, Appellants.— Final order and interlocutory judgment unanimously affirmed, with costs. No opinion.

Jabez Clews, as Administrator, etc., of William J. Clews, Deceased, Appellant, v. Union Bag and Paper Company, Respondent.— Judgment and order unanimously affirmed, with costs. No opinion.

Jane E. Coons, Respondent, v. Horton Rue, Appellant. — Appeal dismissed, without costs. No opinion. All concurred.

John K. Cullin, Respondent, v. William J. Alvord, as Sheriff of Columbia County, Appellant, Impleaded with Martha R. Ryder.— Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.

Kearon Fitzpatrick, an Infant, by William Fitzpatrick, his Guardian ad Litem, Appellant, v. The Town of Schaghticoke, Respondent, Impleaded with The Town of Lansingburgh. — Judgment unanimously affirmed, with costs. No opinion.

Hudson River Water Power Company v. Glens Falls Gas and Electric Light Company and Glens Falls Portland Cement Company. — Motion granted, and the following question certified: Does the counterclaim set forth in the amended answer of the defendant Glens Falls Gas and Electric Light Company state facts sufficient to constitute a cause of action?

In the Matter of the Judicial Settlement of the Accounts of Ruth Hunt, as Executrix, etc., of Thomas Hunt, Deceased. — Motion to modify order granted. Order to be settled by Chester, J.

In the Matter of the Judicial Settlement of the Accounts of George W. Peck, as Executor, etc., of George W. Banker, Deceased, and Henrietta M. Banker, Deceased. — Motion granted, with costs, unless the appellant files and serves copies of papers on appeal within twenty days and pays to the respondent twenty dollars, in which case motion denied, without costs.

Edwin G. Moore, Appellant, v. William N. Coler, Sr., and Others, Respondents.— Order affirmed, with costs. No opinion. All concurred. Houghton, J., not sitting.

The People of the State of New York ex rel. Childs Company, Relator, v. Nathan L. Miller, as Comptroller of the State of New York, Respondent.— Determination of the Comptroller modified by reducing the amount of the tax to $1,470.54, and as so modified confirmed, with $50 costs and disbursements to the relator. No opinion. All concurred.

The People of the State of New York ex rel. Nassau Company, Relator, v. Nathan L. Miller, as Comptroller of the State of New York, Respondent.— Determination of the Comptroller confirmed, with fifty dollars costs and disbursements. No opinion. All concurred.

The People of the State of New York, Respondent, v. William Proctor, Appellant.— Judgment of conviction affirmed. No opinion. All concurred.

Martin Powell v. Everett Harrison et al.— Motion denied.

Mary Powell v. Hudson Valley Railway Company.— Motion denied.

Willis W. Russell, Appellant, v. Horace Inman and Harry A. Inman, Trading under the Name and Style of Inman Manufacturing Company, Respondents.— Judgment and order affirmed, with costs. No opinion. All concurred, except Houghton, J., dissenting.

Frederick W. Sander, Respondent, v. The State of New York, Appellant.— Judgment affirmed, with costs. No opinion. All concurred, except Houghton, J., dissenting.

Kittie F. Smith v. Hudson Valley Railway Company.— Motion denied.

Cora A. Walker, Respondent, v. The Town of Pittsfield, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.

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CONTRACT — *Continued.* PAGE.

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CORPORATION — *Complaint against certain corporations and individuals, alleging misrepresentations inducing the sale of some of the stock of one of the corporations, and other misrepresentations inducing stockholders of such corporation to exchange its stock for that of the other corporations, the diversion of the proceeds of the sale of the stocks, and asking for an accounting and receiver — it does not state a cause of action.*] 1. The complaint in an action brought by Frederick Phillips, suing on behalf of himself and of all stockholders of the Sonora Copper Company, against the Sonora Copper Company, the Puertecito Copper Company and the Empire Consolidated Quicksilver Mining Company, all foreign corporations, and a number of individuals who controlled the affairs of such corporations, set forth a prospectus issued by the Sonora Copper Company, inviting subscriptions to the treasury stock of the company, together with a statement issued by the Sonora Copper Company, and alleged that certain statements in the prospectus and statement were not true; that they were issued pursuant to some fraudulent scheme for the purpose of promoting sales of the stock of the Sonora Copper Company; that as a result of the issuance and circulation of the prospectus and of their personal efforts by solicitation and correspondence and of statements with regard to the properties of the Sonora Copper Company, the individual defendants succeeded in selling a large amount of the stock of said company to various persons. It was not alleged that the plaintiff purchased any stock in reliance upon the prospectus or upon the statements made by the company or by the individual defendants.

The complaint further alleged that the Sonora Copper Company is not now engaged in business, and "that, if the said Company now has any assets or claims of any sort of any value, there is grave reason to apprehend that said assets and claims will be dissipated and lost unless cared for by some persons other than the defendants;" that the individual defendants had, by certain false and fraudulent representations, succeeded in inducing certain stockholders of the Sonora Copper Company to exchange their stock for stock of the Puertecito Copper Company and of the Empire Consolidated Quicksilver Mining Company and were now engaged in persuading other stockholders of the Sonora Copper Company to do so; that all these wrong and fraudulent acts had been done in pursuance of some conspiracy to defraud the stockholders of the Sonora Copper Company. It was not alleged that any of these false and fraudulent statements had deceived the plaintiff, or had caused him any injury or had affected the value of his stock.

The complaint further alleged that large sums of money were obtained by the individual defendants from the sale of the stock of the Sonora Copper Company; that such money had been diverted from the use of the Sonora Copper Company and had been delivered to the other defendant cor-

NEGLIGENCE — *Duty of an infant,* non sui juris, *to exercise care commensurate with its years and intelligence — whether it does so is a question for the jury.*] 1. In an action brought to recover damages resulting from the death of the plaintiff's intestate, a child five and a half years of age, who, during the daytime, was struck and killed by one of the defendant's street cars, it appeared that the child was, for her age, particularly bright, active, alert and intelligent.

The court in its charge left it to the jury to say whether or not the child was *sui juris,* and instructed them, if they found that she was, she was chargeable with her own negligence, but that if they found she was *non sui juris,* then she was not chargeable with her own negligence, but only with the negligence of the person having her in charge.

The defendant requested the court to charge as follows: "that the child, under the circumstances, was required to exercise some care, and if it failed to exercise any care it was guilty of negligence, which negligence was imputable to the plaintiff even though the child should be *non sui juris.*" The court declined to charge other than it had already done.

Held, that the ruling was erroneous.

Semble, that an infant, whether he be *sui juris* or *non sui juris,* is not, in law, excused from exercising such care as is commensurate with his years

* *Sic.*

Ex. A. L. R.
6/27/04.